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No.

In the Supreme Court of the United States

OCTOBER TERM, 1984

RAMIRO M. GUERRA, ET AL.,
Petitioners,

vs.

MARIA CARLOTA GARCIA, ET AL.,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

TRAVIS HIESTER
(Counsel of Record)
ATLAS & HALL
P. O. Drawer 3725
McAllen, Texas 78502
(512) 682-5501
Attorneys for Petitioners

E. L. MENDENHALL, INC., 926 Cherry Street, Kansas City, Mo. 64106, (816) 421-3030

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QUESTIONS PRESENTED

1. Whether the action of a Texas county judge in calling and conducting a special election, on a date previously precleared by the United States Attorney General for all political subdivisions in Texas to conduct special elections, constitutes a "change" in voting practices, standards or procedures which would require a new preclearance of that date for the special election.

2. Whether a plaintiff's claim that is without merit as determined by application of existing law to the pleadings is sufficiently substantial to justify an award of attorney's fees when a defendant's unilateral action moots the issues in the case.

3. Whether a Court, prior to awarding attorney's fees pursuant to 42 U.S.C. §1973(1)(e), is required to review alleged special circumstances which would make the rendition of a judgment for attorney's fees unjust.

LIST OF PARTIES

The only parties not listed in the caption are:

PETITIONERS, Norberto Salinas, Charles Curtis, J. R. Ponce, Ramiro Cavazos and Hidalgo County, Texas.

RESPONDENTS, Juana de la Cruz, Paulino Ramirez, Jesus M. Hernandez, Maria Hernandez, Irene Sustayta and Eloisa Leal, individually and on behalf of all others similarly situated.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

The Petitioners respectfully pray that a Writ of Certiorari be issued to review the Judgment and Opinion of the United States Court of Appeals for the Fifth Circuit entered October 29, 1984.

OPINIONS BELOW

The opinion of the Court of Appeals for the Fifth Circuit is reported at 744 F.2d 1159 (5th Cir. 1984). (App. A, pp. A1-A18). The opinion of the District Court (App. D, pp. A23-A24) is not reported.

JURISDICTION

The judgment of the Court of Appeals was entered on October 29, 1984. (App. D, pp. A19-A20). A timely Petition for Rehearing and Suggestion for Rehearing En Banc was denied on December 10, 1984. (App. C, pp. A21-A22). A Motion to Stay the Court's Mandate was filed on December 14, 1984 and denied on December 31, 1984. The jurisdiction of this Court is involved under 28 U.S.C. §1254(1).

STATUTORY PROVISIONS INVOLVED

The statutory provisions involved are 42 U.S.C. §1973c (App. E, pp. A25-A26); 42 U.S.C. §1973l (App. F, pp. A27-A29); Tex. Elect. Code Ann. §2.01b (App. G, pp. A30-A33); and Tex. Educ. Code Ann. §§19.232-19.234. (App. H, pp. A34-A35).

STATEMENT OF THE CASE

In 1975 the State of Texas was placed under the provisions of the Voting Rights Act of 1965, 42 U.S.C. §1973, et seq. At that time, the Texas Legislature amended the portion of the Texas Election Code relating to dates for conducting general (regular) and special elections. The amended subsection (a)[1] (App. I, pp. A36-A37) provided four specific dates for the Texas political subdivisions to call and conduct general (regular) or special elections, and amended subsection (c) (App. I, pp. A37-A38) provided the specific day of the four dates for the Texas political subdivisions to conduct their regular elections.

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1. All subsection references are to House Bill No. 275, Ch. 715, §1, 1975, Tex. Gen. Laws, 2295-2296.

This legislation was submitted by the Secretary of State of the State of Texas to the United States Attorney General ("Attorney General") for preclearance pursuant to Section 5 of the Voting Rights Act of 1965, 42 U.S.C. §1973 with the request that the submission be considered to be a blanket submission for all political subdivisions in Texas. Approval was obtained from the Attorney General for all Texas political subdivisions to conduct special elections on the four dates specified in subsection (a) and their regular election on the date specified in subsection (c). (App. J, pp. A42-A43). The effect on Texas school districts of this preclearance by the Attorney General, was to require such districts to conduct their regular elections on the first Saturday in April and to allow them to conduct special elections on any one of the four specific dates contained in subsection (a). Since the 1975 preclearance was obtained from the Attorney General, there has been no change in the first sentence of subsection (a) (which provides the specific dates for general (regular) and special elections) or the portion of subsection (c) related to the requirement that Texas school districts conduct their general (regular) elections in April.

The Texas legislature has required that elections for the consolidation of two school districts be called, conducted and the results canvassed by a neutral party, the County Judge and the County Commissioners Court. Tex. Educ. Code Ann. §§19.232, 19.233 and 19.234 (Vernon Supp. 1982). (App. H, pp. A34-A35). Under these statutes, when a county judge in Texas is presented a petition from the requisite number of qualified voters in each school district, the county judge is required to call and conduct an election in each of the school districts on the issue of whether or not the registered voters residing in both districts desire the consolidation of the two school districts.

On July 6, 1982, Judge Ramiro M. Guerra, the County Judge of Hidalgo County, was presented with petitions for consolidation from the requisite number of qualified voters in the Weslaco Independent School District and the Progreso Independent School District. Thereafter, on July 19, 1982, Judge Guerra issued his Order calling a special election on the consolidation issue to be held on August 14, 1982. This date was one of the four specific dates prescribed by subsection (a) and precleared by the Attorney General for Texas political subdivisions to conduct special elections, and was the first available date to call a special election after the petitions were submitted to Judge Guerra.[2]

In calling the August 1982 election, the County Judge provided notices of the election in both English and Spanish, designated the same polling places, voting precincts, and method of voting as those used by each of the school districts in their general (regular) elections, and complied with all other requirements of the Voting Rights Act. Subsequently, on Friday, July 23, 1982 the Plaintiffs initiated an action against the County Defendants and the School District Defendants contending that a "change" in voting practices, standards or procedures had occurred because the school district residents were voting in August instead of in April, April being the time that residents voted in their general (regular) elections.

Following Plaintiffs' initiation of this action, the Judge set a hearing on the Temporary Restraining Order for Monday, July 26, 1982. At the hearing, the Judge specifi-

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2. Under Texas law, the next available date for a special election was the third Saturday in January, 1983 because the November election date would be in an even numbered year. Section 2.01b(a) as it existed in 1982 did not permit special election issues to be placed upon the November election ballot in even numbered years. (App. G, pp. A30-A33).

cally refused to make a ruling or a determination of the merits of the legal issues in the case, because the Judge was of the opinion that any such ruling must be made by a three-judge court where a right of appeal is available. The Judge, without ruling on the legal issue of the validity of the Section 5 claim, granted the Temporary Restraining Order until a three-judge court could be convened to decide the legal issues; however, since the Judge was going on a vacation the following day he did not desire to convene a three-judge panel to hear the preliminary injunction within the ten-day period of time the Restraining Order was in effect. The Judge stated that he would come back from his vacation to extend the Restraining Order unless Hidalgo County agreed not to conduct the election [3]

After obtaining this agreement, the Judge invited Hidalgo County to voluntarily preclear the election in order to expedite matters and to save legal, administrative and judicial time and expense. (R.O.A., Vol. 2, pp. 53-54, 56). Following the Judge's suggestion, the County Judge, to allow the consolidation matter to be concluded without the waste of time, effort and expense by the Court, lawyers, witnesses and parties, voluntarily submitted a request for preclearance with the Attorney General to allow the election to be conducted on another date.

No further proceedings were deemed to be necessary by any of the parties until a Motion for Attorney's Fees was filed by Plaintiffs in April 1983 requesting a sum in

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3. The majority of the opinion of the Court of Appeals for the Fifth Circuit determined that Hidalgo County mooted the issues of this case by gratuitously agreeing to not conduct the August 14, 1982 election. However, the record establishes that Judge Vela stated that he would come back from his vacation and would extend the Temporary Restraining Order if this agreement was not obtained and promised that he would never forget it if he had to come back from his vacation. (R.O.A., Vol 2, pp. 50-52).

excess of twenty five thousand dollars ($25,000.00) for legal services rendered in connection with obtaining the Temporary Restraining Order from the County Defendants *and* the School District Defendants. The County Defendants filed a Response to the Motion for Attorney's Fees which contained a certified copy of the Attorney General's blanket preclearance in 1975 of the section of the Texas Election Code that prescribes the dates for conducting special and general (regular) elections for all political subdivisions in Texas (App. J, pp. A42-A43), and which also contained a copy of the unpublished opinion of a three-judge district court in *Turner v. Fainter,* C.A. No. A83CA35 (W.D. Tex. Feb. 8, 1983) (App. K, pp. A44-A46), which held that the Attorney General's 1975 and 1977 preclearances of the Amendments to Article 2.01b, Texas Election Code had given a blanket preclearance to Texas political subdivisions to conduct a special election held to fill a vacancy in office on a date other than the date of the general (regular) election.

On May 13, 1983, the Judge issued an order denying Appellants' Motion for Attorney's Fees and Costs. The Court found, in essence: that the Plaintiffs' claims were groundless and without substance because the date the Hidalgo County Judge set for the consolidation election was specifically set forth within a section of the Texas Election Code that previously had been precleared by the United States Department of Justice; that the County Judge was required to call the election by Section 19.232 of the Texas Education Code; that the Court had not previously made any determination that the law required that the election in question be precleared; and that the voluntary submission of the election for preclearance, while rendering moot the issues involved in this action, did not cause the

Plaintiffs to become prevailing parties. (R.O.A., Vol. 1, pp. 52-53). Appellants filed their appeal from this order.

In *Garcia v. Guerra,* 744 F.2d 1159 (5th Cir. 1984) a panel of the Court of Appeals for the Fifth Circuit reversed the trial court's determination with regard to the County and affirmed the decision with regard to the school districts. The majority opinion, after first refusing to decide definitively whether a preclearance of the August special election date was required by law, abandoned this declaration and determined as "an established fact" in this case, that abandoning the usual election date for conducting general (regular) school elections in April for the August election date was a "change" which had the effect of depriving substantial numbers of Hispanic voters the right to vote in the election. 744 F.2d at 1165. In making the determination that a "change" occurred in voting practices, standards and procedures, the Court treated holding a special election on one of the dates previously precleared for special elections by the Attorney General the same as changing the date of the political subdivision's general (regular) election and also placed great emphasis and reliance on the perceived effect and impact of an August election upon certain persons of Hispanic descent.

The concurring opinion questioned the majority opinion's conclusion as "an established fact" that calling the special election in August was a change covered by the Voting Rights Act. Both opinions determined that the action brought by Plaintiffs was sufficiently substantial to enable a court to determine that the action of Hidalgo County in mooting the issues in the case was required by law, the majority utilizing the standard that the claim was "arguably supported by case or statutory law" and the

concurring opinion utilizing the standard that the claim was "colorable".

In remanding the case to the trial court for a determination of the appropriate fee award against the County Defendants, the Fifth Circuit failed to incorporate an instruction for review of special circumstances that may exist which would make the rendition of attorney's fees unjust—even though the County Defendants had requested this determination or instruction in the event that the Plaintiffs were considered prevailing parties. A Petition for Rehearing and a Suggestion for Rehearing En Banc were filed by the Hidalgo County Defendants and denied by the United States Court of Appeals for the Fifth Circuit on December 10, 1984. A Motion to Stay the Mandate of the Court's decision was filed on December 14, 1984 and was denied on December 31, 1984.

REASONS FOR GRANTING THE WRIT

A. THE DECISION BELOW CONFLICTS WITH DECISIONS OF THE UNITED STATES SUPREME COURT, MISINTERPRETS THE VOTING RIGHTS ACT AND WOULD RESULT IN CHAOS AND CONFUSION IN AND DAMAGE TO THE TEXAS ELECTORIAL SYSTEM.

Two decisions cited by the author of the Fifth Circuit majority opinion, *Beer v. United States*, 425 U.S. 130, 140 (1976) and *Perkins v. Matthews*, 400 U.S. 379, 385 (1971) squarely hold that a court should not look to the effect or impact of the action in making a determination of whether a change in voting practices, standards or procedures exists. The Fifth Circuit panel's majority opinion, however, clearly placed great emphasis and reliance on the effect or impact upon migrant workers of conducting

an election in August[4] and utilized those findings in making its determination that a change occurred in this case. In *Beer*, by upholding a city's proposed reapportionment plan for city council members, the Court approved two at-large council seats that had existed since 1954, despite the fact that at-large council seats generally were in violation of the Voting Rights Act. The Court based its holding on the fact that there was no change in the at-large procedure of the council structure that existed prior to the enactment of the Voting Rights Act, stating:

> This language of §5 clearly provides that it applies only to proposed changes in voting procedures. "[D]iscriminatory practices instituted prior to November, 1964 are not subject to the requirement of preclearance [under § 5]." U.S. Commission on Civil Rights, the Voting Rights Act: Ten Years After, p. 347. 425 U.S. at 138.

Likewise, any preclearance of a particular change in election procedures, standards or practices would establish the status quo and such practices and procedures should have the same effect as any voting practices or procedures which were initiated prior to the enactment of the Voting Rights Act of 1965.

The *Perkins* decision also foreclosed to the Court any determination of whether a covered change would have the purpose or effect of denying or abridging the right to vote on account of race or color. That decision held that the impact of a practice or procedure is not to be considered in determining whether a "change" exists. 400 U.S. at 385.

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4. There was nothing to prevent any voter absent from either school district from voting absentee by mail pursuant to Subdivisions 1 and 4 of Section 5.05 of the Texas Election Code. (App. L, pp. A47-A51). In fact, the record reflects that absentee voting had commenced when the Temporary Restraining Order was issued.

The author of the Fifth Circuit majority opinion, although recognizing that the Attorney General had approved the four specific dates for special elections for Texas political subdivisions, chose not to follow the holdings in *Beer* and *Perkins*. The opinion also ignored the impact of the unpublished opinion in *Turner* which determined that no "change" resulted from the holding of a special election called by the Governor pursuant to subsection (b) on a date other than a general (regular) election date, because that section of the Texas Election Code previously had been precleared by the Attorney General when subsection (a) was precleared. There was and is no difference in calling a special election under either subsection (a) as the County Judge did in this case or (b) as the Governor did in *Turner*, because both subsections prescribe that the special election shall be called on one of the four specified dates unless, under (b), the Governor determines that an emergency exists, in which event the special election to fill a vacancy in office could be called for any date prior to one of the four dates specified by subsection (a).

The approved and established status, practice and procedure for calling and conducting general (regular) and special elections for all political subdivisions in Texas, at the time that this action was initiated in July, 1982, was that regular elections must be called and conducted on the specific date prescribed by subsection (c) and special elections could be called and conducted on any of the four dates prescribed in subsection (a).

The majority opinion, in determining that a "change" existed, confused the School's general (regular) election date with the date of a special election that could have been conducted on any one of the four dates specified in subsection (a) and treated holding a special election on a date previously precleared the same as changing the date

of the political subdivision's general (regular) election.[5] Indeed, the record conclusively establishes that the Progreso Independent School District had conducted another special election in January, 1981, on one of the four dates specified in subsection (a) without any preclearance.

The majority opinion placed great emphasis and reliance on the effect or impact of an August election upon minorities in determining that a "change" occurred, perhaps because this opinion considered incorrect facts related to the two school districts.[6] However, the propriety of this type of consideration is foreclosed by *Beer* and *Perkins* and was appropriately not considered in *Turner*—even though violations of the United States Constitution were alleged by the plaintiffs in that case.

It is important to note that the consolidation election was not called by either of the school districts or their public officials. It was called by a neutral person—an outsider having no interest in the issues involved in the election. Texas law requires the Governor, a county judge, or another neutral public official to call special elections in certain situations. Obviously, there is no possible way that the Governor or a person like the county judge calling

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5. "We cannot assume that the Attorney General would have treated as insignificant *the changing of the regular election date in April to August and the effect of the August date in view of the clear showing in the record*". 744 F.2d at 1165. (Emphasis added)

6. For example, the majority opinion incorrectly recites that the Weslaco Independent School District was predominantly non-Hispanic. 744 F.2d at 1161. This is not true. At the time of the proposed consolidation, the record reflects that the Weslaco Independent School District was 94% Hispanic. All of the school districts in Hidalgo County are predominantly Hispanic because Hidalgo County is 81.3% Hispanic according to the 1980 United States Census. The majority opinion also has confused the general (regular) election with special elections and has wrongly determined that the voters in the Progreso Independent School District had only voted in April. 744 F.2d at 1165.

a special election can determine and make a judgment on all the effects or impact of calling an election on a date set by statute and precleared by the Attorney General but not the date for general (regular) elections.

To require that the disinterested public official calling special elections scrutinize closely the effect or impact of holding a special election on one of the dates precleared for special elections by Texas political subdivisions, as the majority opinion holds, imposes a duty upon public officials to make determinations from subjective criteria. That subjectiveness always would leave room for challenges by persons who do not desire the passage of the issue involved in the special election. *Any* prior clearance by the Attorney General could always be attacked, and a claim be made that any prior preclearance was pro forma and that the alleged effect or impact was not considered by the Attorney General.

As a result of the Fifth Circuit majority opinion, public officials and political subdivisions will be confused and will be reluctant to ever call special elections on any day, even the ones set for regular elections, because they face the threat of litigation if they do. Such reluctance is entirely understandable, as the panel opinion places public officials and the political subdivisions they represent in an absolute no-win situation. If they contest a plaintiff's allegations on the ground that their clearance was properly submitted and approved or had been previously precleared by the Attorney General, they would be involved in costly litigation as well as delay in calling the election, even if they prevail. If the official/subdivision does as the County did in this case and agree to the relief requested, they will end up paying attorney's fees for both their attorneys and the plaintiff's attorneys—even if the political subdivision would have summarily prevailed on the merits. The

plaintiff always could make a "colorable" or "arguable" claim that even a special preclearance was insufficient in that the local public officials and/or the Attorney General had failed to consider some factor or effect alleged to constitute or result in a "change". If the official/subdivision waits and calls the election on the day set for the regular election, they face the real threat of being mandamused by a court proceeding brought by persons desiring to have the election held on a prior date set by subsection (a) for special elections.[7]

If this opinion is not reversed, all special elections that have been conducted by political subdivisions in Texas on days other than their regular election date are voidable —even though the dates on which they were conducted were established by subsection (a) and precleared by the Attorney General in the blanket preclearance for all Texas political subdivisions. This could have an unsettling effect on persons elected in special elections because the Court could invalidate the special election and order a new election to be held for the office. *Perkins v. Matthews*, 400 U.S. 379, 395-397 (1971); *United States v. Cohan*, 358 F. Supp. 1217, 1220 (S.D. Tex. 1973); *Coalition to Preserve Houston v. Interim Board of Trustees of the Westheimer Independent School District*, 494 F. Supp. 738 (S.D. Tex. 1980), *aff'd*, 450 U.S. 901 (1980). Catastrophic results could occur for all political subdivisions who have held or will hold the special elections and could involve expensive costs of litigation and new elections. Of even greater significance would be the dilemma of the public officials and political subdivisions when a bond election (a special election) is invalidated.

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7. Would the persons signing the petitions from the two school districts have been content to wait over six months for the consolidation election to be held on the next available date for a special election after August, 1982?

B. THE DECISION BELOW RAISES SIGNIFICANT AND REOCCURRING PROBLEMS RELATED TO THE DEGREE OF MERIT CONTAINED IN A PLAINTIFF'S CLAIM WHICH WOULD JUSTIFY THE AWARD OF ATTORNEY'S FEES WHEN A DEFENDANT'S UNILATERAL ACTION MOOTS THE ISSUES IN A CASE.

The entire Fifth Circuit panel in this case overruled the trial court's determination that the Plaintiffs' claim for attorney's fees against the County Defendants should be denied, because the County Defendants' conduct was not required by law. In doing so, the Fifth Circuit restated the criteria established by cases in the majority of circuit courts, required for the recovery of attorney's fees when a defendant unilaterally undertakes an action that moots the controversy. According to those criteria, a plaintiff must establish: (1) a cause or connection between the filing of the suit and the defendant's action; and (2) that the defendant's conduct was required by law. 744 F.2d at 1162. The Fifth Circuit cases establishing such criteria are *Williams v. Leatherbury*, 672 F.2d 549 (5th Cir. 1982); *Wooten v. Housing Authority of City of Dallas*, 723 F.2d 390 (5th Cir. 1984); *Posada v. Lamb County, Texas*, 716 F.2d 1066 (5th Cir. 1983).

Such criteria are derived from the reasoning expressed in *Nadeau v. Helgemoe*, 581 F.2d 275 (1st Cir. 1978), wherein the Court set forth the legal test and the factual test for the plaintiff to establish to recover attorney's fees. The *Nadeau* court called for a judicial determination as to whether or not the defendant's conduct was required by law when considering the legal element of the two tests. In making such determination the court recognized that the trial court might have difficulty in determining these legal requirements without a trial on the merits; however, the

Nadeau court reasoned that when the trial court has sufficient exposure to the facts and the law of the case to determine whether, if the plaintiffs continued to press their claim, their action could be considered frivolous, unreasonable or groundless, it could make a conclusion as to whether it should deny the attorney's fees requested by plaintiff. 581 F.2d at 281.

In the case before this Court, the trial judge had before it for consideration a very narrow issue on the legal test related to the award of attorney's fees, that being whether or not a change occurred which would require preclearance of the date on which the special election was called, given that certain facts related to the call of the consolidation election were uncontroverted. The trial court also had before it, in making its determination on the prevailing party issue, the certified copy of the preclearance letters from the Attorney General and a copy of the unpublished opinion in *Turner*, as well as established United States Supreme Court and United States Court of Appeals' decisions. In this situation, the trial court had sufficient exposure to both the facts and the law related to the case to make a valid determination as to whether or not the Defendants' conduct was required by law. The only decision before the courts in this case, trial and appellate, was whether or not the facts involved in the case were sufficiently developed and the law sufficiently clear to determine whether or not the County Defendants' conduct was required by law.

It is important to note that the trial court's decision was made when considering the Plaintiffs' right to attorney's fees only. In *Bly v. McLeod*, 605 F.2d 134 (4th Cir. 1979), a three-judge court initially was impaneled; however, after the case was determined to be moot, only one of the district judges was required to make the determina-

tions and decisions related to whether the plaintiffs in that case were prevailing parties and their right to recover attorney's fees. The panel of the Fourth Circuit Court of Appeals in *Bly*, upheld the one-judge trial court's determination that the plaintiff's claim was without merit even though the case was one brought under the Voting Rights Act of 1965. In *Williams v. Leatherbury*, 672 F.2d 549 (5th Cir. 1982), the court affirmed the determination by one district judge that the plaintiffs were not prevailing parties, noting that the panel's determination that there was no causal connection between the filing of the suit and the defendant's action made it unnecessary for them to make a determination as to whether or not the defendant's at-large election system was legal. 672 F.2d at 551 n.3.

In *Broussard v. Perez*, 572 F.2d 1113 (5th Cir. 1978), where one judge determined the *merits* of a plaintiff's claim brought under the Voting Rights Act of 1965, the court adopted the rule of law pronounced by *Bailey v. Patterson*, 369 U.S. 31 (1962), and permitted the decision of one judge *on the merits* of the case when the issues presented for determination were insubstantial or frivolous because they were controlled by a Supreme Court precedent or could not be seriously contested. 572 F.2d at 1118-1119.

Utilizing the established law that was before it when the decision was made to deny plaintiff's attorney's fees, the trial court in this case was authorized to and correctly determined that the preclearance was not required.

Webster's New World Dictionary 618 (rev. 2nd college ed. 1980) defines groundless as: "Without reason or cause; unjustified". Black's Law Dictionary 601 (rev. 5th ed. 1979) defines frivolous as follows: "Of little weight or importance. A pleading is frivolous when it is clearly insufficient on its face, . . ."

Utilizing these definitions, if a defendant can establish or is able to produce sufficient authority to convince a court that a plaintiff's action should be summarily dismissed either by a Motion for Summary Judgment or by a Motion to Dismiss, the court should consider the situation to be one where the defendant's conduct was *not* required by law. In the case before this Court, these Defendants presented authorities to Judge Vela which enabled him to make such a determination summarily, in the same manner as he would have done had these Defendants filed either of such motions. The authority and reasoning of the square holding in *Turner*, together with the uncontroverted evidence of the preclearance of these dates for special elections by the Attorney General and the established precedent of the United States Supreme Court and Court of Appeals' cases, enabled the District Court to make the correct determination that Hidalgo County was not required to preclear the August 1982 election date.

The majority opinion stated that a claim that is "arguably supported by a case or statutory law" would satisfy the Plaintiffs' burden of proving that the Defendants' conduct was required by law. The concurring opinion held that the Plaintiffs had a "colorable" claim and thus satisfied this requirement. The plain fact is that the Plaintiffs did not present a claim with enough substance to establish that Defendants' conduct was required by law; however, these two statements conflict with and overly liberalize the legal requirement pronounced by the cases cited above.[8]

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8. To further confuse the Fifth Circuit's conflicting requirements in situations of this nature, a recent Fifth Circuit Court of Appeals' decision, *Hennigan v. Ouachita Parish School Board*, No. 84-4157, slip op. at 1580 (Fifth Cir., Jan. 7, 1985) (App. M, pp. A52-A65) has now established that the burden of proving that the defendant's conduct was required by law

(Continued on following page)

To hold that *any* allegations which arguably are supported by case or statutory law are sufficient to justify award of attorney's fees means, in effect, that any argument based on any alleged interpretation of a case or statute will suffice. Under this standard of review, any claim presented by a plaintiff will obligate a defendant to pay attorney's fees—even though the application of the allegations to the existing law (case, statute or regulation) clearly establishes that the plaintiff could not prevail. The impact of the majority opinion is that *any* argument by a plaintiff is sufficient to satisfy the legal test pronounced by the cases cited above as long as the plaintiff can bootstrap a case or statute to the argument. The obvious effect of this holding would be to abolish the legal test that a defendant's conduct must be "required by law" in order to support the award of attorney's fees, which test originally was established by *Nadeau*, and has been followed by a plethora of other cases in the First Circuit and a majority of the other circuits.

The concurring opinion only requires a showing by a plaintiff that its claim was "colorable." Black's Law Dictionary 240 (rev. 5th ed. 1979) defines colorable as: "That which is in appearance only, and not in reality, what it purports to be, hence counterfeit, feigned, having the appearance of truth."

Footnote continued—

should now be shifted to the defendant when the plaintiff establishes that he succeeded on the central issue in the litigation and that the lawsuit caused the defendant to act. *Hennigan* at 1585. Now, not only has *Garcia* widely liberalized the standard of proof required of a plaintiff which was established by prior cases in the Fifth Circuit and other circuits but *Hennigan* has now shifted the burden of proof connected with the legal test from the plaintiff to the defendant. This leaves the status of cases of this nature in absolute confusion and conflict with each other, even within the Fifth Circuit, and there is no way to rationalize the holdings in this case and in *Hennigan* with the prior decisions of the Fifth Circuit and other circuits.

This also is not the standard required by the decisions cited above to establish that a defendant was "required by law" to perform the action requested by the plaintiff. These definitions show a "colorable" action to include claims which squarely fall into the category of being frivolous or groundless. The *Leatherbury* decision requires courts to reject such claims for attorney's fees. Therefore, the concurring opinion's holding that the Plaintiffs' action was "colorable" actually supports denial of the Plaintiffs' attorney's fees rather than a determination that Plaintiffs are entitled to such fees.

If the legal standard or test required of a plaintiff seeking attorney's fees (after a voluntary action of a defendant moots the issues in a case) is reduced allowing a plaintiff to recover attorney's fees on claims that could have been dismissed summarily by a Motion to Dismiss or a Motion for Summary Judgment, requiring merely an "arguable" or "colorable" action to be presented by the plaintiff, defendants will be required to litigate all such claims to a final conclusion on the merits in order to avoid paying the plaintiff's attorney's fees. This again places defendants in a no win position, because defendants will be required to pay attorney's fees to defend these groundless or insubstantial claims. This presents a form of legal blackmail which prevents defendants from taking action that would quickly, inexpensively and effectively moot the issues in a case. It also will result in unnecessary expense and in a waste of judicial, administrative, and legal manpower.

The majority opinion's initial reluctance to make determination of the legal issue was accompanied by its statement that to do so would require it to remand the case for a decision by a three-judge panel which would obviate the time and financial benefits flowing from a resolution of the lawsuit prior to a hearing on the merits. Although

this statement incorrectly interprets the law related to a determination regarding attorney's fees,[9] the statement underscores the contentions made by the County Defendants previously in this brief regarding the position of defendants when actions which have simple factual and legal resolutions are brought against them under the Voting Rights Act of 1965, or under 42 U.S.C. §1983, as well as other similar statutes providing for attorney's fees to the prevailing parties. These defendants will have no choice but to litigate the matter to a full conclusion on the merits instead of saving judicial time, manpower and expense by taking unilateral action to moot the issue in the case. The dockets of the courts are overflowing with cases brought by plaintiffs making claims of the nature and substance of those brought in the action before this Court. These Plaintiffs should not be rewarded by the court's award of attorney's fees when there is a way to determine the merits of the Plaintiffs' claim in a quick summary manner. To do so would be construed as encouraging plaintiffs to bring claims that are without merit for harassment, in hopes that the defendants will somehow settle, take action to moot the case or give the plaintiffs some of the relief requested in their Original Complaint and thus be liable for substantial attorney's fees.

An examination of the record and the law related to this case establishes that the Plaintiffs' claim was and is insubstantial and groundless and was and is able to be determined as such summarily, by a one-judge trial court or a panel of three appellate judges, without resort to any extensive legal research or proceedings on the merits of the case. Therefore, the Plaintiffs' contention that Defendants' action was required by law is insubstantial, groundless and is insufficient to support a claim for attorney's fees.

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9. Since the panel of the Court of Appeals contained three judges, it could have rendered a decision on the merits as well.

C. THE DECISION BELOW DOES NOT REQUIRE THE TRIAL COURT TO REVIEW CONTENTIONS OF SPECIAL CIRCUMSTANCES WHICH MAY EXIST WHICH WOULD MAKE THE RENDITION OF A JUDGMENT FOR ATTORNEY'S FEES UNJUST.

In *Newman v. Piggie Park Enterprises, Inc.*, 390 U.S. 400, 402 (1968), this Court determined in a case brought under Title II of the Civil Rights Act of 1964, §204(a), 42 U.S.C. §2000a-3(a) which provided for the award of attorney's fees to the prevailing party, that the prevailing party should recover attorney's fees unless special circumstances would render such an award unjust. This principle of law has been applied to cases where recovery of attorney's fees is requested for prevailing parties both under 42 U.S.C. §1988 and 42 U.S.C. §1973l(e). See *Criterion Club of Albany v. Board of Commissioners*, 594 F.2d 118 (5th Cir. 1979); *Morrow v. Dillard*, 580 F.2d 1284 (5th Cir. 1978); *Gore v. Turner*, 563 F.2d 159 (5th Cir. 1977); *Johnson v. State of Mississippi*, 606 F.2d 635 (1979).

In *Henderson v. Fort Worth I.S.D.*, 574 F.2d 1210, vacated en banc, 584 F.2d 115 (5th Cir. 1978), cert. denied, 441 U.S. 906 (1979), the panel decision affirmed the trial court's determination that special circumstances existed in that case which were sufficient to deny the award of attorney's fees to the plaintiffs. The trial court determined that because defendants had acted in good faith in following the state statute and because an award of attorney's fees would be payable from the public treasury, sufficient special circumstances existed for the panel of the court to determine that the trial court's judgment in not awarding attorney's fees was not an abuse of discretion. When this issue was considered by the en banc court, the en banc court was evenly divided on the issue.

Although the trial court's decision denying attorney's fees was affirmed because of the special circumstances found, the panel decision has no precedential value because of the failure of the en banc court to affirm it by a majority. Subsequently, this Court denied the Petition for Writ of Certiorari, which had the effect of affirming the determination of the trial court's decision denying attorney's fees because of the special circumstances which would make the award of attorney's fees unjust.

Although the Hidalgo County Defendants uniformly have insisted and contended that the Plaintiffs are not prevailing parties, they have likewise contended throughout the proceeding that there existed special circumstances in this case that would make the award of attorney's fees and costs against them unjust.

Some important special circumstances that exist in this case are as follows:

1. The Hidalgo County Defendants were following state statutes and prior preclearances in calling a special election on a date that had been precleared for special elections by the Attorney General.

2. The Hidalgo County Defendants were acting in good faith in all of their actions connected with calling and conducting the elections.

3. Hidalgo County Defendants were merely neutral instruments in a controversy that they had no interest in. As such, however, they were brought into this case and have incurred substantial attorney's fees and expenses all of which are attributable to the Plaintiffs' steadfast insistence that they are prevailing parties and entitled to attorney's fees from the County Defendants.

4. Hidalgo County Defendants cooperated with the trial court in not requiring extra judicial expense, manpower and time by not requiring the Court to return from his vacation and extend the Temporary Restraining Order, and by following the suggestion of the Court for a simple resolution of the only issue in the case in order to save the Court, the Court's administrative personnel, the federal court system, the attorneys, the parties and the witnesses extensive time, expense and judicial manpower.

5. The Hidalgo County Defendants voluntarily followed the Judge's suggestion but at no point ever conceded to the Plaintiffs, any issue on the merits of this case.

6. The trial court determined, in its May 13, 1983 opinion, in effect, that the position and claim taken by the Plaintiffs were groundless, insubstantial and frivolous because the court could determine from the facts, the certified copies of the preclearances and the law readily available to it that the August date for the special election was both precleared by the United States Department of Justice and approved by the Texas Legislature.

7. The trial court deliberately made no determination on the merits of any issue involved in the case at the hearing on the Temporary Restraining Order and prohibited any such determination until a three-judge court was convened and could make such a ruling. There was no way for Appellees to appeal the Court's Order granting the Temporary Restraining Order. *Moore's Federal Practice*, Vol. 7, part 2, pp. 65-74. At no point did the

Hidalgo County Defendants ever have a meaningful opportunity to present their defenses to the court and allow the court to evaluate the parties' respective positions with regard to the merits of the issues in the case before the Temporary Restraining Order was issued enjoining the August election.

8. The Hidalgo County Defendants were acting in their official capacities and any award of attorney's fees would be payable from the public treasury.

9. In the event that the Hidalgo County Judge did not call a special election on the consolidation issue for August, 1982, the next election date available for a special election on this issue would have been the third Saturday in January, 1983.

10. The Progreso Independent School District had conducted a special election without preclearance on a date which was not its general (regular) date of elections. This election was conducted only approximately one year and a half prior to the date of the August, 1982 special election.

These special circumstances, which are undisputed facts in the record, are sufficient to allow a court to make a determination that the rendition of an award of attorney's fees to the Plaintiffs would be unjust, even if the Plaintiffs were prevailing parties. However, neither the Fifth Circuit majority opinion nor the concurring opinion mentioned the special circumstances contention raised by the Hidalgo County Defendants, stating only that the Plaintiffs were entitled to attorney's fees against the County Defendants and remanding the case for a determination of the appropriate attorney's fee award.

Therefore, the judgment of the majority and the concurring opinions which absolutely awards attorney's fees against the County Defendants, without consideration of special circumstances, is contrary to established precedents from the United States Supreme Court and the Circuit Courts of Appeal. The refusal of the Fifth Circuit to follow these decisions and consider or remand for consideration the special circumstances urged by the Hidalgo County Defendants cannot be justified.

CONCLUSION

For these reasons, the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

TRAVIS HIESTER
(Counsel of Record)
P. O. Drawer 3725
McAllen, Texas 78502
(512) 682-5501
State Bar No. 09500000
Attorney for Petitioners

Of Counsel:

ATLAS & HALL
P. O. Drawer 3725
McAllen, Texas 78502
(512) 682-5501

APPENDIX

APPENDIX A

Maria Carlota GARCIA, et al.,
Plaintiffs-Appellants,

v.

Ramiro M. GUERRA, et al.,
Defendants-Appellees.

No. 83-2318.

United States Court of Appeals,
Fifth Circuit.

Oct. 29, 1984.

Migrant Mexican-American farm workers commenced an action against school districts and county under the Voting Rights Act to enjoin the holding of a school consolidation election scheduled for a time when they were away on their yearly migration. The United States District Court for the Southern District of Texas, Filemon B. Vela, J., denied farm workers' request for attorney fees as prevailing party, and farm workers appealed. The Court of Appeals, Jerre S. Williams, Circuit Judge, held that: (1) school districts were not required by law to submit election date for preclearance or to do anything else in connection with the consolidation election and, thus, were not liable to farm workers for attorney fees, but (2) county was liable to farm workers for an award of attorney fees after county submitted the change in date for the

election to the United States Attorney General for preclearance.

Affirmed in part; reversed and remanded in part.

Randall, Circuit Judge, filed specially concurring opinion.

1. Elections (Key) 12(10)

For purposes of obtaining attorney fee award under the Civil Rights Attorneys' Fees Awards Act, record disclosed that county would have held consolidation election without seeking preclearance of date change had plaintiffs not filed their action under the Voting Rights Act and, thus, established a causal connection between the filing of plaintiff's action and county's date change for the election. Voting Rights Act of 1965, § 5, 42 U.S.C.A. § 1973c; 42 U.S.C.A. § 1988.

2. Civil Rights (Key) 13.17(13)

For plaintiff to obtain an attorney fee award under the Civil Rights Attorneys' Fees Awards Act following unilateral action by defendant that moots the controversy, plaintiff need not show that he or she would have won on the merits; rather, plaintiff need only show that the action taken by defendant was not a wholly gratuitous response to an action that in itself was frivolous or groundless, i.e., not supported by case or statutory law. 42 U.S.C.A. § 1988.

3. Elections (Key) 12(10)

Following change in date for school consolidation election, migrant farm workers, who had commenced action against school districts and other parties under the Voting Rights Act to enjoin the holding of the election at a time when they were away on their yearly migration, were not

entitled to recover as prevailing parties' attorney fees under the Civil Rights Attorneys' Fees Awards Act from school districts, since school districts were not required by law to submit the election to the United States Attorney General for preclearance or to do anything else in connection with the consolidation election. V.T.C.A., Education Code §§ 19.232, 19,233; Voting Rights Act of 1965, § 5, 42 U.S.C.A. § 1973c; 42 U.S.C.A. § 1988.

4. Elections (Key) 12(8)

Where state law did not address question of whether change in date of school consolidation election had to be submitted to the United States Attorney General for preclearance, Court of Appeals looked to the federal Voting Rights Act, its implementing regulations, and the relevant case law to determine whether the date change had to be submitted for preclearance. Voting Rights Act of 1965, § 5, 42 U.S.C.A. § 1973c.

5. Elections (Key) 12(10)

Since action challenging change in date for school consolidation election under the Voting Rights Act was resolved before it reached the three-judge panel in the local district court, Court of Appeals, in order to decide issue as to whether plaintiffs were entitled to attorney fees under the Civil Rights Attorneys' Fees Awards Act, had to only decide whether plaintiffs had shown that the challenged change in date arguably fell within the purview of the Voting Rights Act. Voting Rights Act of 1965, § 5, 42 U.S.C.A. § 1973c; 42 U.S.C.A. § 1988.

6. Elections (Key) 12(4)

Congressional purpose behind enactment of section of Voting Rights Act governing alteration of voting qualifi-

cations and procedures was to ensure that no voting procedure changes would be made by a political subdivision that would lead to a retrogression in the position of racial minorities with respect to their effective exercise of the electoral franchise. Voting Rights Act of 1965, § 5, 42 U.S.C.A. § 1973c.

7. Elections (Key) 1

Abstract right to vote means little unless the right becomes a reality at the polling place on election day. Voting Rights Act of 1965, § 5, 42 U.S.C.A. § 1973c.

8. Elections (Key) 38, 40

Right to vote is abridged if a person does not have prior notice that an election is to take place or if the date set for the election effectively prevents him from exercising his franchise. Voting Rights Act of 1965, § 5, 42 U.S.C.A. § 1973c.

9. Elections (Key) 12(8)

Even though August election date for school consolidation election was one of four general dates for elections preapproved by the United States Attorney General, change in date for school consolidation election from April to August had to be submitted to the United States Attorney General for preclearance, where regular elections involving school districts had traditionally been held in April under state law, and change in date had the potential for denying or abridging right to vote in such election of migrant Mexican-American farm workers, who would be away on their yearly migration north to harvest crops. V.A.T.S. Election Code, art. 2.01b(a); Voting Rights Act of 1965, § 5, 42 U.S.C.A. § 1973c.

10. Elections (Key) 12(4)

The law regarding "change" in section of Voting Rights Act governing alteration of voting qualifications and procedures is directed at the overall statutory purpose of the Act to eliminate discrimination in voting based upon race or color. Voting Rights Act of 1965, § 5, 42 U.S.C.A. § 1973c.

11. Elections (Key) 12(10)

Since there were reasonable grounds to believe that change in date for school consolidation election had to be submitted under the Voting Rights Act to the United States Attorney General for preclearance, migrant Mexican-American farm workers were entitled to an award of attorney fees as prevailing parties under the Civil Rights Attorneys' Fees Awards Act after county submitted date change for such election for preclearance following the commencement of farm workers' action to enjoin the holding of the election at a time when they were away on their yearly migration. Voting Rights Act of 1965, § 5, 42 U.S.C.A. § 1973c; 42 U.S.C.A. § 1988.

Raul Noriega, TX Rural Legal Aid, Inc., San Antonio, Tex., Jose R. Rodriguez, Director, Farm Worker Div., Laurence E. Norton, II, Weslaco, Tex., for plaintiffs-appellants.

George P. Powell, McAllen, Tex., for Progreso.

Robert L. Galligan, Weslaco, Tex., for Weslaco.

Travis Hiester, Michael Mills, McAllen, Tex., for Hidalgo.

Appeal from the United States District Court for the Southern District of Texas.

Before RANDALL, TATE and WILLIAMS, Circuit Judges.

JERRE S. WILLIAMS, Circuit Judge:

Appellants appeal from the district court's denial of their request for attorney's fees made under the Voting Rights Act of 1965, 42 U.S.C. § 1973*l*(e) and the Civil Rights Attorneys' Fees Awards Act of 1976, 42 U.S.C. § 1988.[1] Finding that appellants meet the requirements of a "prevailing party" set out in *Williams v. Leatherbury*, 672 F.2d 549 (5th Cir. 1982), as against appellees Hidalgo County and Ramiro M. Guerra, but not as against the appellee school districts, we affrm in part and reverse and remand in part.

I. FACTS

Appellants, Mexican-American farm workers, filed this action pursuant to Section 5 of the Voting Rights Act, 42 U.S.C. § 1973c, against Hidalgo County, Texas, Ramiro M. Guerra, County Judge of Hidalgo County, and the Progreso and Weslaco Independent School Districts.[2] They

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1. Section 1973*l*(e) provides:

> In any action or proceeding to enforce the voting guarantees of the fourteenth or fifteenth amendment, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.

Section 1988, provides in pertinent part:

> In any action or proceeding to enforce a provision of sections 1981, 1982, 1983, 1985, and 1986 of this title, title IX of Public Law 92-318, or title VI of the Civil Rights Act of 1964, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.

2. Also named as defendants were Hidalgo County Commissioners Norberto Salinas, Charles Curtis, J.R. Ponce and Ramiro Cavazos; Weslaco Independent School District Trustees

(Continued on following page)

sought to enjoin the holding of an election scheduled for August 14, 1982, a time when migrant farm workers who were registered to vote in Hidalgo County were away on their yearly migration. These farm workers are virtually all Hispanic. The purpose of the election was to decide if the Progreso School District, a district predominantly composed of Hispanic students, should be consolidated with the adjacent Weslaco School District, a district predominantly composed of non-Hispanic white students.

Regular elections involving the school districts in Hidalgo County had traditionally been held in April pursuant to article 2.01b(a) of the Texas Election Code. Article 2.01b(a) provides four dates on which the State's political subdivisions may hold elections. These dates are the third Saturday in January, the first Saturday in April, the second Saturday in August, and the first Tuesday after the first Monday in November. Prior to enactment of the Texas statute, all four dates were precleared by the United States Department of Justice pursuant to Section 5 of the Voting Rights Act. Appellants' action sought to enjoin the holding of the August election on the grounds that the appellees had failed to submit the April-to-August change in election dates to the United States Attorney General pursuant to Section 5 of the Voting Rights Act. In response, appellees maintained that since the August

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Footnote continued—

Richard Vaughn, Jr., Dr. Roberto Perez, J.J. Valli, Domingo Sepulveda, Robert McAllen, Gloria Llewellyn and Stephany Wiley; Weslaco Independent School District Superintendent Tony Rico; Progreso Independent School District Trustees Rito Valdez, Apolinar Ramirez, R. Rene E. Luna, Eligio Castillo, O.D. Emery, Gilbert Rodriguez, and Arturo Valdez; and Progreso Independent School District Superintendent Jose Sanchez. For simplicity, all defendants for Hidalgo County including County Judge Guerra, will be referred to as "the County." Any reference to "the school districts" will include the above-named trustees and superintendents of the Weslaco and Progreso Independent School Districts.

date had already been precleared, they were not required to resubmit the date for further preclearance.

After a hearing on July 26, 1982, the district court issued a temporary restraining order, restraining appellees from holding the consolidation election until a three-judge panel could be convened to decide the issue. Before the three-judge panel had an opportunity to hear the case, Hidalgo County, following the suggestion of the district court judge, voluntarily submitted a preclearance application to the United States Department of Justice to preclear a date for an election on the consolidation issue. After delays with the Justice Department, the election was precleared for April 2, 1983. The election was held on that date, and the school district consolidation was defeated.

Following the consolidation election, appellants moved for attorney's fees and costs asserting that since appellants had received the primary relief sought, *i.e.*, a change from the scheduled August election date and submission of a later date for preclearance, they were prevailing parties. The district court denied appellants' motion, holding that "[t]he voluntary submission of the election for preclearance by Defendants, while rendering moot the issues involved in this action, did not cause the Plaintiffs to become prevailing parties in the eyes of the Court." Appellants challenge this decision.

II. THE LEATHERBURY TEST

In *Williams v. Leatherbury, supra*, 672 F.2d at 550, we acknowledged that "[v]ictory by judgment or an opponent's concession is not essential to identification of the 'prevailing party' entitled to recovery of an attorney's fee under the Act." We stated that if a defendant unilaterally undertakes action that moots the controversy, a plaintiff

nevertheless may recover attorney's fees if he can show (1) a causal connection between the filing of the suit and the defendant's action; and (2) that the defendant's conduct was required by law. *Id.* at 551; *Wooten v. Housing Authority of City of Dallas,* 723 F.2d 390, 391 (5th Cir.1984); *Posada v. Lamb County, Texas,* 716 F.2d 1066, 1071 (5th Cir.1983).

[1] In defining "casual connection," we stated that the plaintiff's suit must have been " 'a substantial factor or a significant catalyst in motivating the defendants to end their unconstitutional behavior.' " *Leatherbury,* 672 F.2d at 551, *quoting Robinson v. Kimbrough,* 652 F.2d 458, 466 (5th Cir.1981). There is no serious question that appellants have met the requirements of the first prong of the *Leatherbury* test. It is clear from the record that had appellants not filed this lawsuit, the County would have held the consolidation election on August 14, 1982, without seeking preclearance of the April-to-August date change. In fact, absentee balloting had already commenced approximately four hours before issuance of the TRO.

The difficult question is whether the action taken by the appellees was required by law,[3] the second prong of the *Leatherbury* test. In answering this question, we do not decide definitively whether preclearance of the April-to-

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3. For practical purposes, we recognize that the action actually taken by the appellees which mooted the controversy, i.e., getting preclearance of the April 1983 election date, was in all likelihood not required by law. The April date was the regular election date and therefore not a "change" in voting procedure. The issue of the August date became moot due to the court's issuance of the TRO and its further suggestion that the parties honor the TRO (which actually expired several days before the election date) until the hearing by the three-judge panel. We nonetheless focus on the question of whether appellees would have been required to submit the August date for preclearance since that was the substance of appellants' complaint below and because we acknowledge that but for the passage of time, that would be the issue we would have to decide.

August change was required by law. A definitive answer would require a decision on the merits of appellants' claim. Such a decision properly should be made by a three-judge panel pursuant to Section 5. Hence, if a definitive answer were required, we would have to remand the case for a decision by a three-judge panel. Such action would totally obviate the time and financial benefits that flow from a resolution of a lawsuit prior to a full blown hearing on the merits.

[2] The second prong of the *Leatherbury* test, consequently, does not require appellants to show that they would have won on the merits. Rather, as the *Leatherbury* case said, appellants need only show that the action taken by the appellees was "not a wholly gratuitous response to an action that in itself was frivolous or groundless." 672 F.2d at 551. A claim is not frivolous if it is arguably supported by case or statutory law. It is with this standard in mind that we proceed to analyze whether there are reasonable grounds to believe that the August date needed to be submitted for preclearance and whether the appellees' actions in not holding the election in August and in submitting a later date for preclearance were therefore not merely "gratuitous."

The district court was not convinced that further preclearance of the August election date was required by law. The court stated:

> The consolidation election being challenged by this action was designated to be held on a date that was both precleared by the United States Department of Justice and approved by the Texas Legislature. Furthermore, the election was called by Ramiro M. Guerra, County Judge of Hidalgo County, Texas, as required by Section 19.232 of the Texas Election Code.

For the reasons discussed in Part IV *infra*, we disagree with the district court's conclusion.

III. THE SCHOOL DISTRICTS

Sections 19.232 and 19.233 of the Texas Education Code require that upon petition by a requisite number of qualified voters in adjacent school districts, the county judge must call an election to allow voters in the school districts to decide if they desire a consolidation of the school districts.

[3] The school districts correctly point out that §§ 19.232 and 19.233 impose no obligations or duties with regard to election activities upon the school districts which are the subject of a consolidation election. Hence, we conclude that the district court correctly denied appellants' recovery of attorney's fees as against the school districts since they were not required by law to submit the election date for preclearance or to do anything else in connection with the consolidation election.

IV. THE COUNTY

[4] Article 2.01b of the Texas Election Code does not address the question of whether a change of the type involved in this case should have been submitted for preclearance. We therefore look to Section 5 of the Voting Rights Act, its implementing regulations, and the relevant case law to determine whether the date change should have been submitted for preclearance.

[5] Section 5 of the Voting Rights Act of 1965, as amended in 1975, provides that whenever a State or political subdivision covered by the Act shall enact or seek to administer "any voting qualification or prerequisite to voting, or standard practice, or procedure with respect to voting different from that in force or effect on November 1,

1972 . . . no person shall be denied the right to vote for failure to comply with such qualification, prerequisite, standard, practice, or precedure" unless the chief legal officer or other appropriate official of such State or subdivision has submitted the qualification, prerequisite, standard, practice, or procedure to the Attorney General of the United States "and the Attorney General has not interposed an objection within sixty days after such submission."[4]

The Act defines the terms "vote" and "voting" to include "all action necessary to make a vote effective in any primary, special, or general election, including, but not limited to registration, . . . casting a ballot, and having such ballot counted properly and included in the appropriate totals of votes cast with respect to candidates for public or party office and propositions for which votes are received in an election." 42 U.S.C. § 1973*l*(c)(1).

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4. Appellants do not allege, nor need we consider, whether the appellees acted with discriminatory motive or intent in making the date change. The Supreme Court instructed in *Allen v. State Board of Elections*, 393 U.S. 544, 559, 89 S.Ct. 817, 828, 22 L.Ed.2d 1 (1969) that a consideration of whether a change challenged under § 5 has a "discriminatory purpose or effect" is not a proper inquiry in determining whether a particular change is covered by § 5. The Supreme Court noted that Congress intended to treat "coverage" questions differently from "substantive discrimination" questions. The Court stressed that a determination of whether a covered change does or does not have the purpose or effect of "denying or abridging the right to vote on account of race or color" is reserved for consideration by the District Court for the District of Columbia or the Attorney General, whereas a determination of whether a change is covered by § 5 is reserved for a three-judge panel in the local district court. *Ibid; see also, Perkins v. Matthews*, 400 U.S. 379, 91 S.Ct. 431, 434, 27 L.Ed.2d 476 (1971). Since this case was resolved before it reached the three-judge panel, in order to decide the attorney's fee issue, we need only decide whether the appellants have shown that the challenged change arguably falls *within the purview of* § 5. The substantive question of discriminatory effect or purpose is not for us to decide.

[6] The congressional purpose behind the enactment of § 5 was to insure that no voting procedure changes would be made by a political subdivision "that would lead to a retrogression in the position of racial minorities with respect to their effective exercise of the electoral franchise." *Beer v. United States*, 425 U.S. 130, 141, 96 S.Ct. 1357, 1364, 47 L.Ed.2d 629 (1976).

In *Allen v. State Board of Elections*, 393 U.S. 544, 566-67, 89 S.Ct. 817, 832, 22 L.Ed.2d 1 (1969), the Supreme Court held that Congress clearly intended that § 5 be given "the broadest possible scope" to reach "any state enactment which alter(s) the election law of a covered State in even a minor way." The Court pointed out that Congress expressly "chose not to include even . . . minor exceptions [e.g., changing from paper ballots to voting machines] in § 5, thus indicating an intention that all changes, no matter how small, be subjected to § 5 scrutiny." *Id.* at 568, 89 S.Ct. at 833.

Relying upon *Allen*, the Court held in *Perkins v. Matthews*, 400 U.S. 379, 387, 91 S.Ct. 431, 436, 27 L.Ed.2d 476 (1971) that a change in the location of polling places constitutes a change in the voting "standard, practice or procedure" and is therefore covered by § 5. In making this decision, the Court reviewed the types of changes which have historically been considered by the Department of Justice to be within the scope of § 5. These changes include: changes in voter qualifications in municipal elections; changes from paper ballots to voting machines; changes in the dates of municipal elections; changes in the place of registration; increases in the terms of municipal officials; and an enactment of an act requiring an oath

to be taken by all voters. *Id.* at 387-89 & n. 7, 393 n. 11,[5] 91 S.Ct. at 436-437 & n. 7, 439 n. 11.

[7, 8] Tested by the standard used by the Supreme Court in *Allen* and *Perkins*, the change challenged in this case falls within the purview of § 5. As the Supreme Court noted, "[t]he abstract right to vote means little unless the right becomes a reality at the polling place on election day." *Perkins*, 400 U.S. at 387, 91 S.Ct. at 436. The Court emphasized that this right is substantially abridged if polling places are located at distances remote from certain communities or at places where voters would be reluctant to enter because of their race. This right is similarly abridged if a person does not have prior notice that an election is to take place or if the date set for the election effectively prevents him from exercising his franchise.

[9] The record shows that a significant number of registered voters in Hidalgo County are Mexican-American migrant farmworkers who migrate north annually in late April to harvest crops and return in mid September. The petition for the consolidation election was filed on July 6, 1982. Based upon the petition, appellee Guerra announced on July 19, 1982, that the consolidation election would be held on August 14, 1982. In all likelihood, the migrant farmworkers who were away on their yearly migration did not even have notice that an election was to be held, much less the opportunity to return to vote in the election.

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5. *See also* Hearings on H.R. 6400 before Subcommittee No. 5 of the House Committee on the Judiciary, 89th Cong., 1st Sess., ser. 2, p. 62 (1965); Hearings on Voting Rights Act Extension before Subcommittee No. 5 of the House Committee on the Judiciary, 91st Cong., 1st Sess., ser. 3, pp. 308-313 (1969); Hearings on Amendments to the Voting Rights Act of 1965 before the Subcommittee on the Constitutional Rights of the Senate Committee on the Judiciary 91st Cong., 1st Sess., 248 (1969).

Inherent in the April-to-August date change was the obvious potential for "denying or abridging the right to vote on account of race or color."

[10] While it is true that the August election date was one of the four general dates for elections pre-approved by the United States Attorney General, the established fact in this case is that abandoning the usual April date for school elections for the August date was a "change" which had the effect of depriving substantial numbers of Hispanic voters of the right to vote in the election. There is nothing in the Voting Rights Act which requires that once regular election dates are precleared, changes in elections which actually deprive voters of the right to vote because of their race are no longer of statutory concern. The law regarding "change" in 42 U.S.C. § 1973c is obviously directed at the overall statutory purpose to eliminate discrimination in voting based upon race or color. And in § 1973b(f)(2) the statute specifically forbids any "voting qualification, or prerequisite to voting, or standard, *practice* or *procedure*" which "abridges" the right to vote because of membership in "a language minority group." (emphasis added). Section 1973l(c)(3) defines a language minority group as including persons who are "of Spanish heritage."

These circumstances explain why there is at least some significance in the fact that where the date for an election was submitted to the Attorney General, the Attorney General did pre-clear the date. The Department of Justice might well have treated the request for pre-clearance as a routine matter in which submission was unnecessary. But note that the submission was for a date other than the August date upon which the election was originally set. We cannot assume that the Attorney General would have treated as insignificant the changing of the regular election

date from April to August and the effect of the August date in view of the clear showing in the record. The inescapable fact in the record is that the August date deprived substantial numbers of Hispanic registered voters of the right to vote. Their absence from their homes at that time of year was a regular occurrence and was well-known in the community.

Finally, the County urges this Court to find that Judge Guerra, in calling for the consolidation election, was merely acting in accordance with the dictates of §§ 19.232 and 19.233 of the Texas Education Code. While it is true that the Code required Judge Guerra to call a consolidation election upon receipt of the requisite number of petition signatures, the Code did not designate a specific time period within which the election was required to be held. The presumption is that the county judge should have called for the consolidation at the next legally permissible time. It was clear at that time that an August election would deprive the migrant farmworkers of the right to participate in the election. Therefore, the judge was bound by the strictures of § 5 to submit the change for preclearance or hold the election at the regular April date.

V. CONCLUSION

[11] In sum, we conclude that there were reasonable grounds to believe that the August election date was required to have been submitted for preclearance pursuant to § 5. Thus, by not holding the consolidation election in August, the County was not acting gratuitously; rather it was merely doing what it may well have been required by law to do. As such, we conclude that appellants satisfied the two prongs of the *Leatherbury* test and were prevailing parties against Hidalgo County. They are, therefore, entitled to attorney's fees as against the County, the

County Commissioners and Judge Guerra. We reverse and remand the case to the district court for a determination of the appropriate fee award.

We further conclude that since the Progreso and Weslaco School Districts were not legally required to do anything in connection with the consolidation election, appellants have failed to show prevailing party status as against the school districts. We, therefore, affirm the district court's denial of attorney's fees as against these parties.

AFFIRMED IN PART;

REVERSED AND REMANDED IN PART.

RANDALL, Circuit Judge, specially concurring.

Although I concur in the result reached by the panel, I cannot join in the majority's opinion because I find it unnecessarily broad. As the majority observed, under *Williams v. Leatherbury*, 672 F.2d 549, 551 (5th Cir.1982), attorney's fees can be awarded under the prevailing party standard only if the appellant's claim is not frivolous or groundless. Thus, I agree with the court's general refusal to consider the merits of the appellant's suit to enjoin the election. Moreover, because I believe that there were "reasonable grounds" for the appellant's claim, I concur in the judgment of the court. In the course of its opinion, however, the majority quite clearly departs from the *Leatherbury* standard by regarding as "established fact" the proposition that the holding of the special election in August was itself a "change" within the ambit of section 5. In my view, this declaration by the court is both questionable and unnecessary to the holding.

The record clearly indicates that the Progreso and Weslaco School Districts had never before been the sub-

ject of a consolidation election. The election itself was a special election called by the county judge pursuant to § 19.233 to be held at the next available precleared date. The previous elections that were mentioned in the majority opinion as being held traditionally in April were all regular elections for school board trustees. Under these circumstances, it is not at all clear to me that the holding of the special consolidation election in August was a "change" from past practices. The consolidation election can be just as easily considered a one-time event which could have been set for any of the precleared dates.

In any event, the essential point here is that the panel went beyond the applicable standard in considering the merits of the issue at all. Under the *Leatherbury* standard, the panel should have held only that the appellant's claim was colorable, while intimating no opinion on its merits.

APPENDIX B

(Filed January 15, 1985)

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 83-2318

D. C. Docket No. CA-B-82-200
MARIA CARLOTA GARCIA, ET AL.,
Plaintiffs-Appellants,

versus

RAMIRO M. GUERRA, ET AL.,
Defendants-Appellee.

Appeal from the United States District Court for the Southern District of Texas

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Before RANDALL, TATE and WILLIAMS, Circuit Judges.

JUDGMENT

This cause came on to be heard on the record on appeal and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed in part reversed in part, and that this

cause be, and the same is hereby remanded in part to the said District Court in accordance with the opinion of this Court;

IT IS FURTHER ORDERED that the appellants and appellees Hildago (sic) County, Texas, Hildago (sic) County Commissioners and Ramiro M. Guerra bear the costs on appeal equally.

October 29, 1984

RANDALL, Circuit Judge, concurring.

ISSUED AS MANDATE: JAN 2 1985

APPENDIX C

(Filed December 10, 1984)

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 83-2318

MARIA CARLOTA GARCIA, ET AL.,
Plaintiffs-Appellants,

versus

RAMIRO M. GUERRA, ET AL.,
Defendants-Appellees.

Appeal from the United States District Court for the Southern District of Texas

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ON PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC

(Opinion October 29, 1984, 5 Cir., 198.., ... F.2d .....)

(December 10, 1984)

Before RANDALL, TATE and WILLIAMS, Circuit Judges.

PER CURIAM:

(X) The Petition for Rehearing is DENIED and no member of this panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc, (Federal Rules of Appellate Procedure and Local Rule 35) the Suggestion for Rehearing En Banc is DENIED.

( ) The Petition for Rehearing is DENIED and the Court having been polled at the request of one of the members of the Court and a majority of the Circuit Judges who are in regular active service not having voted in favor of it, (Federal Rules of Appellate Procedure and Local Rule 35) the Suggestion for Rehearing En Banc is also DENIED.

( ) A member of the Court in active service having requested a poll on the reconsideration of this cause en banc, and a majority of the judges in active service not having voted in favor of it, rehearing en banc is DENIED.

ENTERED FOR THE COURT:

/s/ J. H. Williams
United States Circuit Judge

APPENDIX D

(Filed May 13, 1983)

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
BROWNSVILLE DIVISION

C. A. No. B-82-200

MARIA CARLOTA GARCIA, ET AL

vs.

RAMIRO M. GUERRA, ET AL

ORDER

On this day came on to be heard Plaintiff's Motion For Attorneys' Fees And Costs, and the Court, having considered the same together with the briefs and arguments of Counsel, is of the opinion that the same should be DENIED.

The Court does not consider the Plaintiffs to be "prevailing parties" as that term is contemplated by 42 U.S.C. §1973 1(e) and §1988. The consolidation election being challenged by this action was designated to be held on a date that was both precleared by the United States Department of Justice and approved by the Texas Legislature. Furthermore, the election was called by Ramiro M. Guerra, County Judge of Hidalgo County, Texas, as required by Section 19.232 of the Texas Election Code. No determination was made by this Court that it was required by

law that the election in question be precleared. The voluntary submission of the election for preclearance by Defendants, while rendering moot the issues involved in this action, did not cause the Plaintiffs to become prevailing parties in the eyes of the Court. It is therefore

ORDERED that Plaintiffs' Motion be DENIED.

Done at Brownsville, Texas this 13th day of May, 1983.

/s/ Filemon B. Vela
Filemon B. Vela
United States District Judge

APPENDIX E

42 USCS § 1973c

§ 1973c. Declaratory judgment proceedings instituted by State

Whenever a State or political subdivision with respect to which the prohibitions set forth in section 4(a) [42 USCS § 1973b(a)] based upon determinations made under the first sentence of section 4(b) [42 USCS § 1973b(b)] are in effect shall enact or seek to administer any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1964, or whenever a State or political subdivision with respect to which the prohibitions set forth in section 4(a) [42 USCS § 1973b(a)] based upon determinations made under the second sentence of section 4(b) [42 USCS § 1973b(b)] are in effect shall enact or seek to administer any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1968, or whenever a State or political subdivision with respect to which the prohibitions set forth in section 4(a) [42 USCS § 1973b(a)] based upon determinations made under the third sentence of section 4(b) [42 USCS § 1973b(b)] are in effect shall enact or seek to administer any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1972, such State or subdivision may institute an action in the United States District Court for the District of Columbia for a declaratory judgment that such qualification prerequisite, standard, practice, or procedure does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color, or in contravention of the guarantees set

forth in section 4(f)(2) [42 USCS § 1973b(f)(2)], and unless and until the court enters such judgment no person shall be denied the right to vote for failure to comply with such qualification, prerequisite, standard, practice, or procedure: Provided, That such qualification, prerequisite, standard, practice, or procedure may be enforced without such proceeding if the qualification, prerequisite, standard, practice, or procedure has been submitted by the chief legal officer or other appropriate official of such State or subdivision to the Attorney General and the Attorney General has not interposed an objection within sixty days after such submission, or upon good cause shown, to facilitate an expedited approval within sixty days after such submission, the Attorney General has affirmatively indicated that such objection will not be made. Neither an affirmative indication by the Attorney General that no objection will be made, nor the Attorney General's failure to object, nor a declaratory judgment entered under this section shall bar a subsequent action to enjoin enforcement of such qualification, prerequisite, standard, practice, or procedure. In the event the Attorney General affirmatively indicates that no objection will be made within the sixty-day period following receipt of a submission, the Attorney General may reserve the right to reexamine the submission if additional information comes to his attention during the remainder of the sixty-day period which would otherwise require objection in accordance with this section. Any action under this section shall be heard and determined by a court of three judges in accordance with the provisions of section 2284 of title 28 of the United States Code [28 USCS § 2284] and any appeal shall lie to the Supreme Court.

(Aug. 6, 1965, P. L. 89-110, Title I, § 5, 79 Stat. 439; June 22, 1970, P. L. 91-285, §§ 2, 5, 84 Stat. 314, 315; Aug. 6, 1975, P. L. 94-73, Title II, §§ 204, 206, Title IX, § 405, 89 Stat. 402, 404.)

APPENDIX F

42 USCS § 1973l

ENFORCEMENT OF VOTING RIGHTS

§ 1973l. Enforcement proceedings

(a) Criminal contempt. All cases of criminal contempt arising under the provisions of this Act shall be governed by section 151 of the Civil Rights Act of 1957 (42 U.S.C. 1995) [42 USCS § 1995].

(b) Jurisdiction of courts for declaratory judgment, retaining orders, or temporary or permanent injunction. No court other than the District Court for the District of Columbia or a court of appeals in any proceeding under section 9 [42 USCS § 1973g] shall have jurisdiction to issue any declaratory judgment pursuant to section 4 or section 5 [42 USCS § 1973b or 1973c] or any restraining order or temporary or permanent injunction against the execution or enforcement of any provision of this Act or any action of any Federal officer or employee pursuant hereto.

(c) Definitions. (1) The terms "vote" or "voting" shall include all action necessary to make a vote effective in any primary, special, or general election, including, but not limited to, registration, listing pursuant to this Act, or other action required by law prerequisite to voting, casting a ballot, and having such ballot counted properly and included in the appropriate totals of votes cast with respect to candidates for public or party office and propositions for which votes are received in an election.

(2) The term "political subdivision" shall mean any county or parish, except that where registration for

voting is not conducted under the supervision of a county or parish, the term shall include any other subdivision of a State which conducts registration for voting.

(3) The term "language minorities" or "language minority group" means persons who are American Indian, Asian American, Alaskan Natives or of Spanish heritage.

(d) Subpoenas. In any action for a declaratory judgment brought pursuant to section 4 or section 5 of this Act [42 USCS § 1973b and 1973c] subpoenas for witnesses who are required to attend the District Court for the District of Columbia may be served in any judicial district of the United States: Provided, That no writ of subpoena shall issue for witnesses without the District of Columbia at a greater distance than one hundred miles from the place of holding court without the permission of the District Court for the District of Columbia being first had upon proper application and cause shown.

(e) Costs. In any action or proceeding to enforce the voting guarantees of the fourteenth or fifteenth amendment [USCS Constitution, Amendments 14, 15] the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.

(Aug. 6, 1965, P. L. 89-110, Title I, § 14, 79 Stat. 445; June 22, 1970, P. L. 91-285, § 2, 84 Stat. 314; Aug. 6, 1975, P. L. 94-73, Title II, § 207, Title IV, § 402, 89 Stat. 402, 404.)

HISTORY; ANCILLARY LAWS AND DIRECTIVES
References in text:

"This Act", referred to in this section, is popularly known as the Voting Rights Act of Aug. 6, 1965, as

amended, and appears generally as 42 USCS §§ 1971 et seq. For full classification of this Act, consult USCS Tables volumes.

Amendments:

1975. Section 207 of Act Aug. 6, 1975, added paragraph (3) of subsec. (c).

Section 402 of Act. Aug. 6, 1975, added subsec. (e).

Redesignation:

Section 2 of Act June 22, 1970, redesignated this section, formerly part of Act Aug. 6, 1965, to be part of Title I of Act Aug. 6, 1965.

APPENDIX G

ELECTION CODE

Art. 2.01b. Dates for holding general and special elections

(a) Except as provided in Subsections (b) and (l) of this section, every general (regular) or special election held by the state or by any county, city, school district, water district, or any other political subdivision or agency of this state must be held on one of the following dates: the third Saturday in January, the first Saturday in April, the second Saturday in August, or the first Tuesday after the first Monday in November. Provided, however, that in even-numbered years the only issues which may be submitted to the voters in an election held on the first Tuesday after the first Monday in November shall be the election of state and county officers, the election of officers of a general-law city or town wherein the governing body of said city finds that the religious tenets of more than 50 percent of the registered voters of said city prohibit the adherents from voting in an election held on Saturday, the election of officers of a home-rule city with a population of less than 30,000, according to the last preceding federal census, where such city or town used, prior to 1975, the first Tuesday after the first Monday in November of even-numbered years as the date for the election of its officers, and amendment's to the constitution of this state submitted to the voters by the legislature. This requirement does not apply to runoff elections, political subdivisions using the convention method of election, local option elections held under the Alcoholic Beverage Code, elections for bonds and elections for school maintenance taxes, to the biennial party primary elections held to nominate candidates for

public office, or to confirmation elections, director elections, and maintenance tax elections, held in conjunction with the creation of political subdivisions provided for by Article XVI, Section 59, of the Texas Constitution, which furnish water or sewer services to household users. An election held on an unauthorized date is void.

(b) When a vacancy in office is to be filled at a special election, the election must be called for a date specified in Subsection (a) unless the governor finds the existence of an emergency that warrants calling the election for an earlier date. When the governing body of a political subdivision wishes to call an emergency special election to fill a vacancy, the governing body shall submit a request to the governor for permission to call the election, and the governor may grant permission if he finds that an emergency exists.

(c) In even-numbered years the only issues which may be included on the ballot of the election held on the first Tuesday after the first Monday in November shall be the election of state and county officers, the election of officers of a general-law city wherein the governing body of said city finds that the religious tenets of more than 50 percent of the registered voters of said city prohibit the adherents from voting in an election held on Saturday the election of officers of a home-rule city with a population of less than 30,000, according to the last preceding federal census, where such city or town used prior to 1975, the first Tuesday after the first Monday in November of even-numbered years as the date for the election of its officers, and constitutional amendments submitted to the people by the legislature. The governing body of local political subdivisions shall be allowed to choose for their permanent election day any of the above four election dates. The filing deadline for candidates, the dates for canvassing the

returns of the election, the date for commencement of terms of office filled at the election, and any other date incidental to the election shall fall on the date that has the same relationship to the date of the election as provided under the preexisting law. Where by preexisting law the terms of office are set to commence on a specified calendar date and the date of the election is changed by this section, the governing board of the political subdivision shall set the date on which the terms begin until otherwise provided by law. A runoff election, when required, shall be held on a date that provides the same time interval with relation to the main election as provided under the preexisting law.

(d) When under the provisions of Subsection (c) the beginning date for a term of office is changed to fall on an earlier date, the current term on the effective date of this section is shortened accordingly, and the holder of the current term shall surrender the office to his successor on the beginning date of the succeeding term or as soon thereafter as the successor has qualified. When the beginning date is changed to fall on a later date the incumbent in office at the expiration of the current term as set by preexisting law shall continue to perform the duties of the office, as required by Section 17 of Article XVI of the Texas Constitution, until the successor has qualified for the succeeding term.

(e) When a preexisting law requires that a special election be called within a specified time period after the occurrence of a certain event, the election shall be called for a date authorized in Subsection (a) of this section that falls within that time period; or if there is no authorized date within the period that allows sufficient time to comply with other requirements of law, the election shall be called for the first authorized date after its expiration,

except that the election shall be called for some other date within the time period where the constitution requires it.

Acts 1951, 52nd Leg., p. 1097, ch. 492, art. 9b, added by Acts 1975, 64th Leg., p. 2295, ch. 715, § 1, eff. Jan. 1, 1976. Secs. (a) to (c) amended by Acts 1977, 65th Leg., p. 2032, ch. 811, § 2, eff. Aug. 29, 1977, Secs. (a) and (c) amended by Acts 1979, 66th Leg., p. 503, ch. 234, § 1 eff. Aug. 27, 1979; Sec. (a) amended by Acts 1981, 67th Leg., p. 888, ch. 314, § 1, eff. Aug. 31, 1981; Acts. 1981, 67th Leg., p. 2401, ch. 607, § 1, eff. Aug. 31, 1981.

APPENDIX H

PUBLIC SCHOOLS

§ 19.232. Petition

A petition signed by 20 or a majority of the legally qualified voters of each of the several contiguous school districts proposed to be consolidated and praying for an election to authorize the consolidation shall be presented to the county judge of the county in which the school districts are located, or if one or more districts to be consolidated is a county-line district, to the county judge of the respective county or counties having jurisdiction thereof.

§ 19.233. Election Order; Notice

Under the receipt of a petition fulfilling the qualifications of Section 19.232 of this code, each county shall:

(1) issue an order for a election to be held on the same day in each district included in the proposed consolidated district; and

(2) give notice of the date and purpose of the election by publication of the order in some newspaper published in the county for at least 20 days prior to the date on which the elections are to be held or by posting a notice of the election in each of the districts or by both publication and posted notice.

§ 19.234. Canvass; Result

(a) The commissioners court of the county (or the commissioners court of the several counties, if more than one county is involved) shall at the next meeting thereof, canvass the returns of the election in each district voting and publish the results separately for each district.

(b) If the votes cast in each and all districts show a majority in each district voting separately in favor of the consolidation, the commissioners court (or the commissioners courts of the several counties, if more than one county is involved) shall declare the school districts consolidated. If less than a majority of the votes cast in any one of the districts is in favor of the consolidation, then another election involving the same consolidation proposal may not be held until at least one year has elapsed since the date of the election.

APPENDIX I

ELECTIONS—UNIFORM DATES—JOINT ELECTIONS OF POLITICAL SUBDIVISIONS

CHAPTER 715

H. B. No. 275

An Act setting uniform dates for holding general and special elections in this state, adjusting existing election dates and terms of office to the uniform dates, and authorizing political subdivisions to hold joint elections; adding Sections 9b and 9c to the Texas Election Code; providing an effective date and termination date; and declaring an emergency.

Be it enacted by the Legislature of the State of Texas:

Section 1. The Texas Election Code is amended by adding[40] Section 9b, to read as follows:

"9b. Dates for holding general and special elections

"(a) Except as provided in Subsections (b) and (e) of this section, every general (regular) or special election held by the state, or by any county, city, school district, water district, or any other political subdivision or agency of this state must be held on one of the following dates: the third Saturday in January, the first Saturday in April, the second Saturday in August, or the first Tuesday after the first Monday in November. Provided, however, that in even-numbered years the only issues which may be included on the ballot of the election held on the first Tuesday after the first Monday in November shall be the election of state and county officers and amendments to the constitution of this state submitted to the voters by the

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40. V.A.T.S. Election Code, art. 2.01b.

legislature. This requirement does not apply to runoff elections, elections held under Chapter 467, Acts of the 44th Legislature, 2nd Called Session, 1935, as amended, bond elections, or to the biennial party primary elections held to nominate candidates for public office. An election held on an unauthorized date is void.

"(b) When a vacancy in office is to filled at a special election, the election must be called for a date specified in Subsection (a) unless the governor finds the existence of an emergency that warrants calling the election for an earlier date. When the governing body of a political subdivision wishes to call an emergency special election to fill a vacancy, the governing body shall submit a request to the governor for permission to call the election, and the governor may grant permission if he finds that an emergency exists.

"(c) The date of the general (regular) elections of the political subdivisions of this state shall be as follows: an election which by preexisting law is set for a date falling in the month of December, January, or February shall be held on the third Saturday in January; an election which is set for a date falling in the month of March, April, May, or June shall be held on the first Saturday in April; an election which is set for a date falling in the month of July, August, or September shall be held on the second Saturday in August; and an election which is set for a date falling in the month of October or November shall be held on the first Tuesday after the first Monday in November. Provided, however, that in even-numbered years the only issues which may be included on the ballot of the election held on the first Tuesday after the first Monday in November shall be the election of state and county officers and constitutional amendments submitted to the people by the

legislature. The elections of political subdivisions which by preexisting law fall in the months of October or November in even-numbered years shall be held on the third Saturday in January. The governing body of local political subdivisions whose elections by preexisting law fall annually in the month of October or November shall be allowed to choose for their permanent election day any of the above four election dates. The filing deadline for candidates, the dates for canvassing the returns of the election, the date for commencement of terms of office filled at the election, and any other date incidental to the election shall fall on the date that has the same relationship to the date of the election as provided under the preexisting law. Where by preexisting law the terms of office are set to commence on a specified calendar date and the date of the election is changed by this section, the governing board of the political subdivision shall set the date on which the terms begin until otherwise provided by law. A runoff election, when required, shall be held on a date that provides the same time interval with relation to the main election as provided under the preexisting law.

"(d) When under the provisions of Subsection (c) the beginning date for a term of office is changed to fall on an earlier date, the current term on the effective date of this section is shortened accordingly, and the holder of the current term shall surrender the office to his successor on the beginning date of the succeeding term or as soon thereafter as the successor has qualified. When the beginning date is changed to fall on a later date, the incumbent in office at the expiration of the current term as set by preexisting law shall continue to perform the duties of the office, as required by Section 17 of Article XVI of the Texas Constitution, until the successor has qualified for the succeeding term.

"(e) When a preexisting law requires that a special election be called within a specified time period after the occurrence of a certain event, the election shall be called for a date authorized in Subsection (a) of this section that falls within that time period; or if there is no authorized date within the period that allows sufficient time to comply with other requirements of law, the election shall be called for the first authorized date after its expiration, except that the election shall be called for some other date within the time period where the constitution requires it."

Sec. 2. The Texas Election Code is amended by adding[41] Section 9c, to read as follows:

"9c. Joint elections of political subdivisions

"(a) When two or more political subdivisions of this state are holding elections on the same day in all or part of the same territory, the governing bodies of any two or more of the political subdivisions may agree to hold their elections jointly in the election precincts that can be served by common polling places. When any other statute makes a joint election mandatory, a joint election must be held in accordance with the terms of the statute; and if any other political subdivisions are holding elections in any part of the same territory, any or all of them any also join in the agreement for a joint election.

"(b) When a joint election is to be held, a resolution reciting the terms of the agreement, including the method for allocating the expenses for the election, shall be adopted by the governing body of each of the participating political subdivisions. The agreement may provide for use of a single ballot form at each polling place, to contain all the offices or propositions to be voted on at that polling place,

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41. V.A.T.S. Election Code, art. 2.01c.

or for separate ballot forms; provided, however, that no voter shall be given a ballot containing any office or proposition on which the voter is ineligible to vote. One set of election officers may be appointed to conduct the joint election, and any person who is qualified to serve as an election officer in the election of any one of the participating political subdivisions may be appointed to serve in the joint election. Poll lists, tally lists, return forms, and other records for the various elections may be combined in any manner convenient and adequate to record and report the results of each election. Where paper ballots or punchcard ballots are used, one set of ballot boxes and one stub box may be used for receiving all ballots and ballot stubs for the joint election. Returns on joint or separate forms may be made to, and the canvass made by, each officer, board, or body designated by law to receive and canvass the returns for each election, or one of such officers, boards, or bodies may be designated to receive and canvass the returns for the joint election and to report the results of each election to the proper authority. Where other records are combined, the officer designated by law to be the custodian of the records for any participating subdivision may be designated in the agreement to be the custodian of the combined records. Where the counted ballots for more than one subdivision are deposited in a single ballot box, the officer designated by law to be the custodian of the voted ballots for any one of the subdivisions may be designated in the agreement to be the custodian."

Sec. 3.[42] (a) This Act shall take effect on January 1, 1976.

(b) This Act shall no longer be in effect after the first Monday after the third Saturday in January, 1978.

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42. V.A.T.S. Election Code, art. 2.01b note.

Sec. 4. The importance of this legislation and the crowded condition of the calendars in both houses create an emergency and an imperative public necessity that the constitutional rule requiring bills to be read on three several days in each house be suspended, and this rule is hereby suspended.

Passed by the House on March 19, 1975: Yeas 99, Nays 39; and that the House concurred in Senate amendments to H. B. No. 275 on May 27, 1975, by a non-record vote; passed by the Senate, with amendments, on May 23, 1975, by a viva-voce vote.

Approved June 21, 1975.

Effective Jan. 1, 1976.

APPENDIX J

DEPARTMENT OF JUSTICE
Washington, D.C. 20530

DEC 16 1975

Mr. John F. Pettit
General Counsel
Office of the Secretary of State
State of Texas
Austin, Texas 78711

Dear Mr. Pettit:

This is in reference to House Bill 275, consolidating election days in the State of Texas, which was submitted to the Attorney General pursuant to Section 5 of the Voting Rights Act of 1965. Your submission was received on November 20, 1975. In accordance with your request, expedited consideration has been given to this submission pursuant to the procedural guidelines for the administration of Section 5 (28 C.F.R. 51.22).

The Attorney General does not interpose an objection to the change in question. However, we feel a responsibility to point out that Section 5 of the Voting Rights Act expressly provides that our failure to object does not bar any subsequent action to enjoin the enforcement of this act should such action become necessary.

In reference to your request that your submission be considered a blanket submission for all political subdivisions in Texas, the submission is considered a blanket submission for those changes which are mandated by H.B. 275. Where H.B. 275 merely authorizes political subdivisions to make changes, *i.e.*, Section 1c (where the governing

body of political subdivisions whose elections fall in October or November may choose any of the four (4) dates) and Section 2, the changes would fall under Section 5 of the Voting Rights Act separately as the changes occur.

Sincerely,

/s/ J. Stanley Pottinger
J. Stanley Pottinger
Assistant Attorney General
Civil Rights Division

APPENDIX K

(Filed February 8, 1983)

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS

Civil Action No. A83CA35

REV. LEE TURNER, Et Al.,
Plaintiffs,

versus

JOHN FAINTER,
Defendant,

PHIL GRAMM and CHESTER P. UPHAM, JR.,
Intervenors.

Before WILLIAMS, Circuit Judge, SHANNON and GARCIA, District Judges.

PER CURIAM:

This is a suit to enjoin the holding of the special election scheduled for Saturday, February 12, 1983, in the Sixth Congressional District to fill the vacancy created by the resignation of Representative Phil Gramm on January 5, 1983. The Governor set the special election to take place thirty-eight days after the resignation, finding an emergency under the Texas Election Code. The plaintiffs, voters in the Sixth District, seek a preliminary injunction against the election being held absent a preclearance obtained by the State from the Attorney General of the United States.

Reverend Lee Turner and other plaintiffs filed suit in the United States District Court for the Eastern District

of Texas, asserting that the scheduling of the election violated the constitutional rights of minorities under the Fifth, Fourteenth, and Fifteenth Amendments, and was in violation of the Voting Rights Act, 42 U.S.C. § 1973(c), because of a lack of preclearance.

After jurisdiction was denied in the Eastern District of Texas, suit was then brought in the Western District. Judge H. F. Garcia ordered hearing before a three-judge federal court, 28 U.S.C. § 2284(b)(1).

The parties agreed at oral argument that there are no fact issues before the Court. It is agreed that the Governor was in full compliance with the terms of the Texas Election Code in calling this special election. Eleven candidates have been certified by the Secretary of State to appear on the ballot for this special election.

The Court finds the facts in accordance with these agreed facts.

The calling of this special election by the Governor is in accordance with the past practice of the State of Texas both before and after 1972 or the passage of the 1975, 1977 Election Codes in Texas. It is not for this Court to decide whether the Governor in this case properly decided that such a special election was "an emergency". The statute specifically vests this power in the Governor without limitations upon him in deciding the justification for the declaration of such an emergency. The evidence is also clear that such declarations have been a routine matter in special elections to fill congressional vacancies in Texas.

Based upon the facts in this case we are unable to find a "change" in the procedures. Section 1973(c) of the Voting Rights Act requires such a change before preclearance is necessary. The changes that took place with re-

spect to this election took place entirely in the 1975 and 1977 Amendments to the Texas Election Code, and the Attorney General of the United States has given blanket clearance to the provisions of this Code as it relates to the election which is before the Court. We find, for purposes of a preliminary injunction, no necessity for clearance.

Plaintiffs also claim that setting this special election violated their constitutional rights under the Fifth, Fourteenth and Fifteenth Amendments. Their claim is not specific. No actual situations are before the Court. Rather, there is only a general assertion that the short period of five days which was available to potential candidates to obtain signatures in lieu of a $500 filing fee and available for potential candidates to decide whether or not to run discriminated against minorities. This period of elapsed time is not, however, a change in election procedures.

This election has now been scheduled for over a month. The Texas Election Code authorizes setting such an election thirty-five days or more after the proclamation, and this provision was followed. We find that plaintiffs have made no showing wihch justifies the drastic remedy of enjoining the holding of this special election. Denial of the injunction does not foreclose plaintiffs raising issues involving the legality of this election. If there are issues as to the legality of the election, they can be litigated after the election is held. *Cf. Berry v. Doles*, 438 U.S. 190 (1978).

In view of our legal conclusions, this three-judge federal district court exercising its jurisdiction under 42 U.S.C. § 2284(b)(1), holds as follows:

Plaintiffs' prayer for an injunction enjoining the holding of the special election on February 12, 1983, is DENIED.

APPENDIX L

Art. 5.05. Absentee voting

Subdivision 1. Who may vote absentee. (a) Any qualified voter of this state who expects to be absent from the county of his residence on the day of the election, or who will be 65 years of age or older on the day of the election, or who because of sickness, physical disability, confinement in jail, or religious belief cannot appear at the polling place in the election precinct of his residence on the day of the election, or who expects to serve as an election clerk or as a poll watcher on election day in an election precinct other than the precinct of his residence, or who participates in the administration of the election by reason of his or her employment, may nevertheless cause his vote to be cast at any election held in this state by compliance with the applicable method herein provided for absentee voting. If a voter's religious belief prohibits him from voting during any part of the time during which the polls are open on the day of the election, he shall nevertheless be entitled to vote absentee even though the prohibition does not operate throughout the entire time that the polls are open. A voter who is confined in jail is entitled to vote absentee if at the time of applying for an absentee ballot he is: (1) serving a misdemeanor sentence which extends through election day; (2) being held for trial after a denial of bail; (3) being held without bail pending the appeal of a felony conviction; or (4) being held for trial or pending an appeal on a bailable charge but he expects not to have been released on bail by the date of the election.

(b) Absentee voting shall be conducted by two methods: (1) voting by personal appearance at the clerk's

office, and (2) voting by mail. All voters coming within the foregoing provisions of this subdivision may vote by personal appearance at the clerk's office if they are able to make such appearance within the period for absentee voting. Where the ground for voting absentee is confinement in jail, it is not mandatory that the voter be allowed to make a personal appearance, but the officer in charge of the jail, in his discretion, is authorized to make the necessary arrangements to permit the voter to vote by personal appearance.

(c) The following persons, and no other, may vote by mail:

(i) Qualified voters who will be 65 years of age or older on the day of the election, or who because of sickness or physical disability, or because of religious beliefs, cannot appear at the polling place on the day of the election. The application for an absentee ballot shall be made not more than sixty days before the day of the election. It must be mailed to the clerk, and the clerk shall preserve the envelope in which it is received. If the application is delivered to the clerk by any method other than by mailing it to him, the ballot shall be void and shall not be counted. The voter shall state in his application the address to which the ballot is to be mailed to him, which must be either his permanent residence address or the address at which he is temporarily living. If ballot is furnished to the voter by any method other than by mailing it to him, or if it is mailed to any address other than one of the foregoing, it shall be void and shall not be counted. The marked ballot must be mailed to the clerk, and if returned in any other manner it shall be void and shall not be counted.

(ii) Qualified voters who, before the beginning of the period for absentee voting, make application for an absentee ballot on the ground of expected absence from

the county of their residence on election day, and who expect to be absent from the county during the clerk's regular office hours for the entire period of absentee voting. The voter must state in his application that he expects to be absent from the county of his residence on election day and during the clerk's regular office hours for the entire period for absentee voting. The application shall be made not more than sixty days before the day of the election, and may be mailed to the clerk or delivered to him by the voter in person, but the clerk shall not furnish a ballot to the voter by any method other than by mailing it to him. Applications made under this paragraph may be mailed either from within or without the county of the voter's residence, but in every case the ballot must be mailed to the voter at an address outside the county. The ballot shall not be counted unless the carrier envelope in which the ballot is returned to the clerk is postmarked from a point outside the county and the affidavit on the carrier envelope is certified by an officer other than an officer of the county of the voter's residence.

(iii) Qualified voters who, after the beginning of the period for absentee voting, apply for an abstentee ballot on the ground of expected absence from the county and who are absent from such county at the time of applying for an abstentee ballot and expect to be absent from such county during the clerk's regular office hours for the remainder of the period for absentee voting. The voter must state in his application that he is absent from the county at the time of making the application and expects to be absent on election day and during the clerk's regular office hours for the remainder of the period for absentee voting. The clerk shall not mail a ballot to any such voter unless the envelope in which the application is received is postmarked from a point outside the country, and the ballot

must be mailed to the voter at an address outside the county. The ballot shall not be counted unless the envelope in which the ballot is returned to the clerk are each postmarked from a point outside the county and the affidavit on the carrier envelope is certified by an officer other than an officer of the county of the voter's residence.

(iv) Qualified voters who are confined in jail under one of the circumstances listed in the first paragraph of this subdivision. The application for an absentee ballot shall be made not more than twenty days before the day of the election. It must be enclosed in an envelope and either mailed to the clerk or delivered to him by the jailer or one of his deputies or assistants, who shall place his signature on the envelope at the time of its delivery. The clerk shall preserve the envelope in which the application is received. If the application is delivered to the clerk by any method other than as expressly authorized herein, the ballot shall be void and shall not be counted. The clerk shall mail the ballot to the voter in care of the jail where he is confined; and if the ballot is furnished to the voter by any method other than by mailing it to him, or if it is mailed to any other address, it shall be void and shall not be counted. The marked ballot must be mailed to the clerk, and if returned in any other manner it shall be void and shall not be counted.

(d) An application for an absentee ballot to be voted by mail shall state the applicant's permanent address and the address to which the absentee ballot is to be mailed to the applicant, and shall also state the address to which his voter registration certificate is to be mailed back to him.

Subdivision 4. Voting by mail. (a) The period for absentee voting by mail shall begin on the twentieth day preceding the date of the election. An application for an

absentee ballot to be voted by mail must be received in the clerk's office not later than the close of business on the fourth day preceding election day. In county-wide elections and in elections less than county-wide where the authority holding the election has provided that absentee ballots shall be counted by a special canvassing board, the marked ballot must be received in the clerk's office before the official time of closing of the polls on the day of the election. In all other elections which are less than county-wide, the marked ballot must be received in the clerk's office before ten o'clock a.m. on the second day preceding election day. The ballot may be marked by the voter at any time after he receives it.

(b) On the twentieth day preceding election day, or as soon thereafter as possible, the clerk shall mail an official ballot, ballot envelope, and carrier envelope, as described in Subdivision 3b of this section, to each voter who has theretofore made application for a ballot in compliance with this section. On applications which are received between the twentieth day and the fourth day preceding election day, the clerk shall forthwith mail the absentee voting supplies to the voter.

(c) The voter shall mark the ballot, sign his name on the back of the ballot stub, detach the stub from the ballot, fold the ballot, and place it in the envelope marked "Ballot Envelope" and seal the same. The voter shall then place the stub and the ballot envelope in the carrier envelope, seal the same and sign the certificate on the carrier envelope. The carrier envelope shall then be mailed, postage prepaid, to the county clerk.

(d) Repealed by Acts 1977, 65th Leg., p. 1688, ch. 668, § 4, eff. Aug. 29, 1977.

[*See main volume for text of 4a and 4b*]

APPENDIX M

Minnie Ann HENNIGAN, et al.,
Plaintiffs-Appellants,

v.

OUACHITA PARISH SCHOOL BOARD,
et al., Defendants-Appellees.

No. 84-4157.

United States Court of Appeals,
Fifth Circuit.

Jan. 7, 1985.

Named representative of class in civil rights suit appealed from order of the United States District Court for the Western District of Louisiana, Tom Stagg, Chief Judge, which denied motion for attorney fees filed under the Civil Rights Attorney's Fees Awards Act. The Court of Appeals, Alvin B. Rubin, Circuit Judge, held that: (1) a plaintiff who achieves goals sought in a civil rights suit by voluntary action of the defendant "prevails" within meaning of Act if she demonstrates the suit caused defendant to act, unless defendant proves that the plaintiff's claim had no colorable merit and defendant made change gratuitously for reasons unrelated to the potential merit of the suit, and (2) plaintiff class was the prevailing party and was entitled to recover fees under the Act.

Reversed and remanded.

1. Civil Rights (Key) 13.17(13)

A plaintiff who achieves the goals sought in civil rights suit by voluntary action of defendant "prevails" within meaning of the Civil Rights Attorney's Fees Awards Act if she demonstrates that the suit caused defendant to act, unless the defendant proves that the plaintiff's claim had no colorable merit and the defendant made the change gratuitously for reasons unrelated to the potential merit of the suit. 42 U.S.C.A. § 1988.

2. Civil Rights (Key) 13.17(13)

Whether plaintiff's goal was achieved for purposes of establishing "prevailing party" status under the Civil Rights Attorney's Fees Awards Act is determined by applying the "central issue" test. 42 U.S.C.A. § 1988.

3. Civil Rights (Key) 13.17(13)

To demonstrate causal connection between lawsuit and defendant's unilateral action which allows plaintiff to achieve his desired goal, for purposes of establishing "prevailing party" status under the Civil Rights Attorney's Fees Awards Act, plaintiff must demonstrate that his suit was a substantial factor or a significant catalyst in motivating defendant to end its unconstitutional behavior. 42 U.S.C.A. § 1988.

4. Civil Rights (Key) 13.17(13)

When plaintiff has shown both that he succeeded on central issue in litigation and that lawsuit caused defendant to act, he has made a prima facie case that he is the "prevailing party" and entitled to attorney fees under the Civil Rights Attorney's Fees Awards Act; there is no reason to require plaintiff to prove, in addition, that the defen-

dant's conduct fulfilled legal obligation or otherwise to show defendant's motivation. 42 U.S.C.A. § 1988.

5. Civil Rights (Key) 13.17(13)

A plaintiff who brings an action that has no colorable, or even reasonable likelihood of success on the merits is not entitled to recover fees under the Civil Rights Attorney's Fees Awards Act if defendant simply complies with plaintiff's demands and moots case for reasons that have nothing to do with the potential merit of the suit. 42 U.S.C.A. § 1988.

6. Civil Rights (Key) 13.17(13)

A defendant who contends that his conduct was a wholly gratuitous response to a lawsuit that lacked colorable merit, must demonstrate the worthlessness of plaintiff's claims and explain why he nonetheless voluntarily gave the plaintiff the requested relief, in order to avoid liability for attorney fees under the Civil Rights Attorney's Fees Awards Act. 42 U.S.C.A. § 1988.

7. Civil Rights (Key) 13.17(13)

Since plaintiff class fully achieved its goal of reapportionment of parish school board so that its members would be elected entirely by and from residents who lived outside the city, impetus of class action suit was a substantial catalyst in allowing class to obtain desired reapportionment, and defendants were unable to demonstrate that plaintiff class had not presented a colorable claim for relief, plaintiff class was the "prevailing party" and entitled to an award of fees under the Civil Rights Attorney's Fees Awards Act. 42 U.S.C.A. § 1988.

Appeal from the United States District Court for the Western District of Louisiana.

Before CLARK, Chief Judge, GOLDBERG and RUBIN, Circuit Judges.

ALVIN B. RUBIN, Circuit Judge:

[1] Minnie Ann Hennigan, as named representative of a class, appeals from the district court's denial of a motion for attorney's fees filed under the Civil Rights Attorney's Fees Awards Act of 1976.[1] Clarifying the test applied in this circuit, we hold that a plaintiff who achieves the goal sought in a civil rights suit by voluntary action of the defendant prevails within the meaning of the Act if she demonstrates that the suit caused the defendant to act, unless the defendant proves that the plaintiff's claim had no colorable merit and the defendant made the change gratuitously for reasons unrelated to the potential merit of the suit. We therefore find that the class was the "prevailing party", reverse the judgment, and remand for a determination of the reasonable value of the services rendered by the attorneys for the plaintiff class.

I.

At the time this suit was filed, the City of Monroe, Louisiana, which is located in Ouachita Parish, had an independent school district, with a board elected only by and from residents of the City, but Ouachita Parish School Board members were elected by and from residents of the entire Parish, including the City. Thus, City residents had representation on both boards. This class action was instituted by a group of citizens of the Parish who resided outside the City. They sought reapportionment of the

1. 42 U.S.C. § 1988.

Parish School Board so that members of the Board would be elected only by and from residents of the Parish who did not live inside the city limits of Monroe.

The petition alleged that allowing City voters to elect any members of the Parish School Board improperly diluted the voting power of the residents of the Parish who resided outside the City limits, thus violating the equal protection clause of the fourteenth amendment. The class, therefore, sought reapportionment of the Parish School Board pursuant to a provision of the 1974 Louisiana Constitution[2] which requires totally separate and independent school boards for the City of Monroe and for the remainder of Ouachita Parish. This provision had never been implemented because shortly after adoption of the 1974 Louisiana Constitution the United States Justice Department had objected to it on the ground that students from the City of Monroe were allowed to attend Ouachita Parish schools and vice versa. This boundary-crossing practice was banned by the district court's 1980 ruling in a school desegregation case, *Taylor v. Ouachita Parish School Board*.[3]

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2. Article 8, Section 10(B) of the 1974 Constitution of the State of Louisiana provides as follows:

> (*B*) *Ouachita Parish and Monroe City School Systems; Board Membership.* Only persons residing within the jurisdiction of the Monroe City School Board shall be eligible to vote for or be members of the Monroe City School Board. Only persons residing in that portion of Ouachita Parish outside the jurisdiction of the Monroe City School Board shall be eligible to vote for or be members of the Ouachita Parish School Board. The position of a member of either board shall be vacated when he no longer satisfies the requirements of this Paragraph. Notwithstanding any contrary provision of this constitution, this Paragraph shall become operative upon the election of members of the Ouachita Parish School Board taking office in 1977 or upon the first reapportionment affecting the Ouachita Parish School Board, whichever occurs earlier.

3. Civil Action No. 12, 171 (W.D.La., filed July 22, 1966).

In addition to seeking enforcement of the Louisiana Constitution, the class also sought reapportionment of the Parish School Board based on the 1980 Census, as required by the Voting Rights Act,[4] and any other equitable relief deemed proper by the court. The class submitted a detailed reapportionment plan based on totally separate boards for the Parish and the City of Monroe.

In December, 1982, the district court granted partial summary judgment for the Parish School Board on both the Louisiana constitutional and the 1980 Census reapportionment issues. The court specifically stated, however, that the class still might be entitled to equitable relief under the equal protection clause of the fourteenth amendment, "if sufficient facts can be proved."

The court certified the case as a class action in March, 1983. At the certification hearing, the court suggested the possibility of asking the Justice Department to reconsider its earlier rejection of the Louisiana constitutional provision in the light of the district court's holding in *Taylor*. The court asked representatives of the School Board to communicate with the Justice Department about this possibility. Counsel for the class admitted that, if the Justice Department withdrew its objection to the constitutional provision and the Parish School Board voluntarily implemented it, the claims of the class would be moot. Class counsel also stated, however, that the class would seek attorney's fees even if this happened.

Upon application of the School Board, the Justice Department reconsidered its earlier objections, and granted preclearance of the reapportionment provisions which the Board later put into effect. The class then filed its motion for attorney's fees under the Act, 42 U.S.C. § 1988. The

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4. 42 U.S.C. §§ 1973 *et seq.*

district court found the plaintiffs had failed to satisfy "the legal requirements set forth by the governing statutes and the interpretations thereof by the Fifth Circuit," and denied the motion for attorney's fees on behalf of the plaintiff class.

II.

The Act[5] limits eligibility for attorney's fees to the "prevailing party" in a civil rights action. Federal courts have not agreed on the test for determining who is the "prevailing party." The Fifth Circuit has adhered to a standard that, in part, requires the prevailing plaintiff to achieve success on "the central issue as exhibited by the fact that he has acquired the primary relief sought."[6] The First Circuit, in what the Supreme Court has referred to as a typical formulation, has held that the plaintiff must "succeed on any significant issue in the litigation which achieves some of the benefit the parties sought in bringing suit."[7] All of the circuit courts have consistently held,

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5. 42 U.S.C. § 1988 provides in pertinent part:

> In any action or proceeding to enforce a provision of section 1981, 1982, 1983, 1985, and 1986 of this title, title IX of Public Law 92-318, or title VI of the Civil Rights Act of 1964, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.

6. *Iranian Students Ass'n, Inc. v. Edwards*, 604 F.2d 352, 353 (5th Cir.1979) (citations omitted); *Taylor v. Sterrett*, 640 F.2d 663, 669 (5th Cir.1981). *But see Commonwealth Oil Refining Co., Inc. v. EEOC*, 720 F.2d 1383 (5th Cir.1983) (Tate, J., dissenting). For discussions of the extent of success required to be a prevailing party entitled to attorney's fees, see L. Bartell, *Federal Court Awards of Attorney's Fees*, 1111-27, *reprinted in* Civil Practice and Litigation in Federal and State Courts (ALI-ABA Course of Study Materials 1984); S. Nahmod, Civil Rights & Civil Liberties Litigation (1984 Supp.) § 1.19.

7. *Nadeau v. Helgemoe*, 581 F.2d 275, 278-79 (1st Cir.1978). *See Hensley v. Eckerhart*, 461 U.S. 424, 433, 103 S.Ct. 1933, 1939, 76 L.Ed.2d 40 (1983).

however, that a plaintiff may also prevail for § 1988 purposes when the case terminates in his favor by settlement, or when the defendant voluntarily undertakes action that results in accomplishment of the plaintiff's goal even though it moots the case.[8]

III.

The Fifth Circuit opinions have not articulated a consistent standard for measuring whether a plaintiff whose efforts did not result in a judgment in his favor has succeeded sufficiently to be a prevailing party. The district judge may understandably have been misled for we have phrased the test differently, in a number of opinions.[9] Thus, in *Coen v. Harrison County School Board*,[10] we set forth a two-part test: (1) the plaintiff must have obtained the final relief sought in the lawsuit; and (2) his suit must have been a major factor in achieving that result.[11]

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8. *See Maher v. Gagne*, 448 U.S. 122, 129, 100 S.Ct. 2570, 2575, 65 L.Ed.2d 653 (1980); *Wooten v. Housing Authority of City of Dallas*, 723 F.2d 390, 392 (5th Cir.1984). *See generally* L. Bartell *supra* n. 6, at 1118-22.

9. *See, e.g., Smith v. Thomas*, 725 F.2d 354 (5th Cir.1984); *Wooten v. Housing Authority of City of Dallas*, 723 F.2d 390 (5th Cir.1984); *Posada v. Lamb County, Texas*, 716 F.2d 1066 (5th Cir. 1983); *Laurenzo by Laurenzo v. Mississippi High School Activities Ass'n, Inc.*, 708 F.2d 1038 (5th Cir.1983); *Espino v. Besteiro*, 708 F.2d 1002 (5th Cir.1983); *Williams v. Leatherbury*, 672 F.2d 549 (5th Cir.1982); *Robinson v. Kimbrough*, 652 F.2d 458 (5th Cir.1981); *Williams v. City of Fairburn, Georgia*, 640 F.2d 635 (5th Cir.1981); *Coen v. Harrison County School Board*, 638 F.2d 24 (5th Cir.1981), *cert. denied*, 455 U.S. 938, 102 S.Ct. 1427, 71 L.Ed.2d 647 (1982); *Knighton v. Watkins*, 616 F.2d 795 (5th Cir.1980); *Iranian Students Ass'n, Inc. v. Edwards*, 604 F.2d 352 (5th Cir.1979); *Criterion Club of Albany v. Dougherty County, Georgia*, 594 F.2d [illegible] (5th Cir.1979).

10. 638 F.2d [illegible]4 (5th Cir.1981), *cert. denied*, 455 U.S. 938, 102 S.Ct. 1427, 71 L.Ed.2d 647 (1982).

11. *But see Robinson v. Kimbrough*, using the single inquiry: whether the plaintiff's lawsuit was a "substantial factor or a significant catalyst in motivating the defendants to end their

(Continued on following page)

Another formulation of the standard in *Williams v. Leatherbury*,[12] has been even more frequently cited:

> [A] plaintiff may still recover attorney's fees if he can show both a casual connection between the filing of the suit and the defendant's actions and that the defendant's conduct was required by law, *i.e.*, not a wholly gratuitous response to an action that in itself was frivolous or groundless.[13]

This is consistent with the doctrine developed by the First Circuit in *Nadeau v. Helgemoe*,[14] and has been adopted by majority of circuits.[15]

Footnote continued—

unconstitutional behavior." 652 F.2d 458, 466 (5th Cir.1981); *Posada v. Lamb County, Texas*, 716 F.2d 1066 (5th Cir.1983), developing a three-pronged analysis for determining "prevailing party" status: "[a] 'prevailing party' is one whose 'ends are accomplished as the result of the litigation even without formal judicial recognition,' and who 'can show both a causal connection between the filing of the suit and the defendants' action and that the defendants' conduct was required by law.'" *Id.* at 1071 (citations omitted).

12. 672 F.2d 549 (5th Cir.1982).

13. *Id.* at 551.

14. 581 F.2d 275 (1st Cir.1978).

15. *See Environmental Defense Fund, Inc. v. EPA*, 716 F.2d 915, 919 (D.C.Cir.1983); *Johnston v. Jago*, 691 F.2d 283, 286 (6th Cir.1982); *Harrington v. DeVito*, 656 F.2d 264, 266-67 (7th Cir. 1981), *cert. denied*, 455 U.S. 993, 102 S.Ct. 1621, 71 L.Ed.2d 854 (1982); *United Handicapped Federation v. Andre*, 622 F.2d 342, 346 (8th Cir.1980); *California Ass'n of the Physically Handicapped, Inc. v. FCC*, 721 F.2d 667, 671-72 (9th Cir.1983); *Operating Engineers Local Union No. 3 v. Bohn*, 737 F.2d 860, 863 (10th Cir. 1984). *See generally* L. Bartell, *supra* n. 6, 1122; J. Kirkland, *The Recovery of Attorney's Fees in Civil Rights Cases Pursuant to 42 U.S.C. Section 1988*, 476-81, *reprinted in* Recent Developments in Section 1983 Civil Rights Litigation (Practicing Law Institute 1984).

Other circuits, however, have held the plaintiff need establish only a causal connection between his lawsuit and the remedial action taken by the defendant. *See Bonnes v. Long*,

(Continued on following page)

In our recent decision in *Garcia v. Guerra*,[16] the panel majority stated that the plaintiff need demonstrate only that his claim is "not frivolous," meaning that "it is arguably supported by case or statutory law."[17] Judge Randall, in a concurring opinion, stated that the plaintiff must present only a "colorable" claim to satisfy the legal-obligation inquiry.[18]

Despite their variety, all of our prior formulations of the applicable criteria have certain elements in common. All recognize the initial need to identify the goal that the plaintiff sought to achieve in bringing his civil rights action. Although the opinions have not always identified the precise legal or factual condition that the plaintiff sought to change, all have determined the nature of the benefit the plaintiff hoped to gain, or the burden of which he hoped to be relieved, by bringing the lawsuit.[19]

[2] Using this as a benchmark, the first element that must be established by a plaintiff claiming prevailing party

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Footnote continued—

599 F.2d 1316, 1319 (4th Cir.1979), *on appeal after remand*, 651 F.2d 214, 217 (4th Cir.1981), *cert. denied*, 455 U.S. 961, 102 S.Ct. 1476, 71 L.Ed.2d 681 (1982); *see also Shadis v. Beal*, 685 F.2d 824, 831 n. 11 (3d Cir.), *cert. denied*, 459 U.S. 970, 103 S.Ct. 300, 74 L.Ed.2d 282 (1982); *Fields v. Tarpon Springs*, 721 F.2d 318, 321 (11th Cir.1983). *See generally* J. Kirkland, *supra*, 477-78, 480-81.

16. 744 F.2d 1159 (5th Cir.1984).

17. *Id.* at 1163.

18. *Id.* at 1166 (Randall, J., concurring).

19. *See Espino v. Besteiro*, *supra*, 708 F.2d at 1007 ("we must ask whether, 'as a realistic matter, the plaintiff . . . has gained anything from his suit that [he] could not have obtained without litigation.' "), *citing*, *Coen v. Harrison County School Board*, *supra*, 638 F.2d at 26-27; *Robinson v. Kimbrough*, *supra*, 652 F.2d at 465 (proper focus is "upon type of relief obtained from the defendants as a result of the lawsuit."); *Iranian Students Ass'n, Inc. v. Edwards*, *supra*, 604 F.2d at 353 ("the proper focus is whether the plaintiff has been successful on the central issue.") (citation omitted).

status is whether, as a practical matter, the plaintiff's goal was achieved. This is determined in this circuit by applying the central-issue test. In other circuits, as we have discussed, the plaintiff need "succeed [only] on any significant issue in the litigation which achieves some of the benefit [he] sought in bringing suit."[20]

[3] When the plaintiff's goal has been achieved by the defendant's unilateral action, the plaintiff must of course also show that the lawsuit caused the defendant to act, and thus allowed the plaintiff to achieve his desired goal. To demonstrate this causal connection, the plaintiff must demonstrate that his suit was "a substantial factor or a significant catalyst in motivating the defendants to end their unconstitutional behavior."[21] This means more, however, than merely showing that the event occurred after suit was filed. Here, as elsewhere in the law, *propter hoc* must be distinguished from *post hoc*. The inquiry has been described as "an intensely factual, pragmatic one,"[22] and courts should carefully consider the chronology of events in order to assess the provocative effect of the plaintiff's lawsuit.[23]

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20. *Hensley v. Eckerhart*, 461 U.S. 424, 433, 103 S.Ct. 1933, 1939, 76 L.Ed.2d 40 (1983), *quoting*, *Nadeau v. Helgemoe*, 581 F.2d 275, 278-79 (1st Cir.1978). *See also Posada v. Lamb County, Texas, supra*, 716 F.2d at 1071 n. 6.

21. *Garcia v. Guerra*, 744 F.2d 1159 at 1162; *Posada v. Lamb County, Texas*, 716 F.2d 1066, 1072 (5th Cir.1983); *Williams v. Leatherbury*, 672 F.2d 549, 551 (5th Cir.1982); *Coen v. Harrison County School Board*, 638 F.2d 24, 26 (5th Cir.1981), *cert. denied*, 455 U.S. 938, 102 S.Ct. 1427, 71 L.Ed.2d 647 (1982); *Robinson v. Kimbrough*, 620 F.2d 458, 476 (5th Cir.1981).

22. *Posada v. Lamb County, Texas, supra*, 716 F.2d at 1072. *See also Wooten v. Housing Authority of City of Dallas, supra*, 723 F.2d at 392.

23. *See Wooten v. Housing Authority of City of Dallas, supra*, 723 F.2d at 392; *Posada v. Lamb County, Texas, supra*, 716 F.2d at 1072; *Robinson v. Kimbrough, supra*, 625 F.2d at 466.

[4] When the plaintiff has shown both that he succeeded on the central issue in the litigation and that the lawsuit caused the defendant to act, he has made a prima facie case that he is the prevailing party and entitled to attorney's fees. There is no reason to require the plaintiff to prove, in addition, that the defendant's conduct fulfilled a legal obligation or otherwise to show the defendant's motivation.[24]

[5] However, a plaintiff who brings an action that has no colorable, or even reasonable, likelihood of success on the merits is not entitled to recover attorney's fees if the defendant simply complies with the plaintiff's demands and moots the case for reasons that have nothing to do with the potential merit of the suit. Whether activated by economic, political, or purely personal concerns, a defendant may choose voluntarily to make the change sought in the suit rather than undergo protracted and expensive litigation.

[6] A defendant who contends that his conduct was a wholly gratuitous response to a lawsuit that lacked colorable merit, must demonstrate the worthlessness of the plaintiff's claims and explain why he nonetheless voluntarily gave the plaintiffs the requested relief. Forcing the defendant to establish that the plaintiff has not presented a cognizable claim is consistent with the Federal Rules of Civil Procedure which allocates this burden to the defendant at every stage of the litigation.[25]

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24. *See Collins v. Chandler Unified School District*, 644 F.2d 759 (9th Cir.1981); *Johnson v. Summer*, 488 F.Supp. 83 (N.D.Miss. 1980).

25. See Fed.R.Civ.P. 12(b); 41(b); 50(a); 50(b); 56.

IV.

[7] All that remains is to apply this standard to the facts of this case. The goal sought by the plaintiff class was reapportionment of the Ouachita Parish School Board so that its members would be elected entirely by and from residents who live outside the City. The plaintiffs fully achieved their goal. Although preclearance was the means by which the plaintiffs' goal was obtained, the effectuation of the Louisiana constitutional provision was only one of several possible avenues. In fact, the district court had dismissed the claim based on the Louisiana Constitution and the case was proceeding solely on an equal protection theory at the time the school board sought reconsideration. The district court properly ignored the route taken, however, and focused instead on the fact that the plaintiffs arrived at their sought-after destination. The first element of the "prevailing party" standard is, therefore, satisfied.

The district court found that, "[t]he impetus of the class action suit was a substantial catalyst setting in motion a process which resulted in the Justice Department's withdrawal of its objection," and allowed the class to obtain the desired reapportionment. The district court thus properly weighed the causal tie between the plaintiffs' lawsuit and the final result.

Given that the plaintiffs have established both criteria to recovery, the defendants must demonstrate that the plaintiffs have not presented a colorable claim for relief. The record shows, however, that they will be unable to do so. The district court expressly denied defendants' motion to dismiss the suit for failure to state a claim upon which relief can be granted. The court found this motion to be "without merit," and the defendants have failed to demonstrate that this finding is erroneous. There is no reason,

therefore, to deny the plaintiffs attorney's fees as the "prevailing party" under § 1988.

Because fees are due under the standard we have applied, we do not discuss the possibility that fees might also be awarded despite the fact that the plaintiffs' constitutional equal protection claims were never reached, a basis found sufficient in *Smith v. Robinson*[26] when the plaintiff prevailed on a non-fee claim and the court did not reach the constitutional fee-basis claim.

For these reasons, the decision of the district court is REVERSED. We REMAND this case to the district court for a determination of the reasonable value of the services rendered by the attorneys for the plaintiff class in accordance with the factors enunciated in *Johnson v. Georgia Highway Express, Inc.*,[27] and our later decisions interpreting that standard.[28]

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26. ..... U.S. ....., 104 S.Ct. 3457, 82 L.Ed.2d 746 (1984); *See Maher v. Gagne*, 448 U.S. 122, 100 S.Ct. 2570, 65 L.Ed.2d 653 (1980). *McDonald v. Doe*, ... F.2d ..... No. 84-3412 (5th Cir. December 4, 1984); *Raley v. Fraser*, 747 F.2d 287 (5th Cir. 1984).

27. 488 F.2d 714 (5th Cir.1974).

28. *Graves v. Barnes*, 700 F.2d 220, 222 (5th Cir.1983); *Cooper Liquor, Inc. v. Adolph Coors Co.*, 684 F.2d 1087, 1092-93 (5th Cir.1982); *Cooper Liquor, Inc. v. Adolph Coors Co.*, 624 F.2d 575, 583 (5th Cir.1980).

APPENDIX N

ELECTIONS—UNIFORM DATES—JOINT ELECTIONS OF POLITICAL SUBDIVISIONS
CHAPTER 811
H. B. No. 443

An Act relating to uniform dates for holding elections and joint elections held by different political subdivisions; amending Subsections (a), (b), and (c), Section 9b, Texas Election Code, as added (Article 2.01b, Vernon's Texas Election Code); repealing Section 3(b) of Chapter 715, Acts of the 64th Legislature, 1975.

Be it enacted by the Legislature of the State of Texas:

Section 1. Subsection (b), Section 3, Chapter 715, Acts of the 64th Legislature, 1975, which sets an expiration date for Chapter 715, is repealed.[80]

Sec. 2. Subsections (a), (b), and (c), Section 9b, Texas Election Code, as added (Article 2.01b, Vernon's Texas Election Code), is amended[81] to read as follows:

"9b. Dates for holding general and special elections

"(a) Except as provided in Subsections (b) and (e) of this section, every general (regular) or special election held by the state or by any county, city, school district, water district, or any other political subdivision or agency of this state must be held on one of the following dates: the third Saturday in January, the first Saturday in April, the second Saturday in August, or the first Tuesday after the first Monday in November. Provided, however, that in even-numbered years the only issues which may be in-

80. V.A.T.S. Election Code, art. 2.01b note.

81. V.A.T.S. Election Code, art. 2.01b, subsecs. (a) to (c).

cluded on the ballot of the election held on the first Tuesday after the first Monday in November shall be the election of state and county officers, the election of officers of a general-law city wherein the governing body of said city finds that the religious tenets of more than 50 percent of the registered voters of said city prohibit the adherents from voting in an election held on Saturday, and amendments to the constitution of this state submitted to the voters by the legislature. This requirement does not apply to runoff elections, political subdivisions using the convention method of election, elections held under Chapter 467, Acts of the 44th Legislature, 2nd Called Session, 1935, as amended, elections for bonds and school maintenance taxes, or to the biennial party primary elections held to nominate candidates for public office. An election held on an unauthorized date is void.

"(b) When a vacancy in office is to be filled at a special election, the election must be called for a date specified in Subsection (a) unless the governor finds the existence of an emergency that warrants calling the election for an earlier date. When the governing body of a political subdivision wishes to call an emergency special election to fill a vacancy, the governing body shall submit a request to the governor for permission to call the election, and the governor may grant permission if he finds that an emergency exists.

"(c) In even-numbered years the only issues which may be included on the ballot of the election held on the first Tuesday after the first Monday in November shall be the election of state and county officers, the election of officers of a general-law city wherein the governing body of said city finds that the religious tenets of more than 50 percent of the registered voters of said city prohibit the adherents from voting in an election held on

Saturday, and constitutional amendments submitted to the people by the legislature. The governing body of local political subdivisions shall be allowed to choose for their permanent election day any of the above four election dates. The filing deadline for candidates, the dates for canvassing the returns of the election, the date for commencement of terms of office filled at the election, and any other date incidental to the election shall fall on the date that has the same relationship to the date of the election as provided under the preexisting law. Where by preexisting law the terms of office are set to commence on a specified calendar date and the date of the election is changed by this section, the governing board of the political subdivision shall set the date on which the terms begin until otherwise provided by law. A runoff election, when required, shall be held on a date that provides the same time interval with relation to the main election as provided under the preexisting law."

Sec. 3.[82] The provisions of Sections 9b and 9c, Texas Election Code (Articles 2.01b and 2.01c, Vernon's Texas Election Code), enacted by Chapter 715, Acts of the 64th Legislature, 1975, supersede any inconsistent or conflicting provision of any other statute enacted before the regular session of the 65th Legislature, provided, that nothing contained herein shall be construed as superseding the provisions of Subsection (i), Section 130.082, Texas Education Code, as amended. They also supersede any inconsistent or conflicting provision of any other statute enacted at the regular session of the 65th Legislature, regardless of the relative order of passage with respect to this Act, unless the other statute expressly states that its provisions prevail over the provisions of Sections 9b and 9c.

---

82. V.A.T.S. Election Code, art. 2.01b note.

Sec. 4. The importance of this legislation and the crowded condition of the calendars in both houses create an emergency and an imperative public necessity that the constitutional rule requiring bills to be read on three several days in each house be suspended, and this rule is hereby suspended.

Passed by the House on April 5, 1977, by a non-record vote; and that the House concurred in Senate amendments to H. B. No. 443 on May 30, 1977, by a non-record vote; and that the House adopted H.C.R. No. 195 authorizing certain corrections in H. B. No. 443 on May 30, 1977, by a non-record vote; passed by the Senate, as amended, on May 28, 1977, by a viva-voce vote; and that the Senate adopted H.C.R. No. 195 authorizing certain corrections in H. B. No. 443 on May 30, 1977

Approved June 16, 1977.

Effective Aug. 29, 1977, 90 days after date of adjournment.

APPENDIX O

UNITED STATES DEPARTMENT OF JUSTICE

Washington, D.C. 20530

AUG 22 1977

Honorable Mark White
Secretary of State
State of Texas
Capitol Station
Austin, Texas 78711

Attention: Ms. Karen C. Gladney
Elections Division

Dear Mr. Secretary:

This is in reference to House Bill 443 of the 1977 Texas Legislature, submitted to the Attorney General pursuant to Section 5 of the Voting Rights Act of 1965, as amended. Your submission was received on June 30, 1977. Although we noted your request for expedited consideration, we were unable to comply.

The Attorney General does not interpose any objection to the change in question. However, we feel a responsibility to point out that Section 5 of the Voting Rights Act expressly provides that the failure of the Attorney General to object does not bar any subsequent judicial action to enjoin the enforcement of such change.

We wish to remind you that any changes in election date made pursuant to House Bill 443 (1977) are subject to the preclearance requirements of Section 5.

Sincerely,

DREW S. DAYS III
Assistant Attorney General
Civil Rights Division
By: /s/ Gerald W. Jones
Gerald W. Jones
Chief, Voting Section

Office - Supreme Court, U.S.
FILED
APR 6 1985
ALEXANDER L. STEVAS
CLERK

No. 84-1367

In The
Supreme Court of the United States
October Term, 1984

RAMIRO M. GUERRA, ET AL.,
Petitioners,

vs.

MARIA CARLOTA GARCIA, ET AL.,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

LAURENCE E. NORTON, II
JOSE R. RODRIGUEZ
Staff Attorneys
DAVID G. HALL
Executive Director
Texas Rural Legal Aid, Inc.
259 South Texas
Weslaco, Texas 78596
(512) 968-9574

RAUL NORIEGA
Attorney of Record for Respondents
Project Director
Voting Rights Litigation Project
Texas Rural Legal Aid, Inc.
201 N. St. Mary's St. Suite 630
San Antonio, Texas 78205
(512) 222-2478

COCKLE LAW BRIEF PRINTING CO. (800) 835-7427 Ext. 333

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QUESTIONS PRESENTED

1. Whether Respondents are prevailing parties and entitled to attorneys' fees in the absence of a determination on the merits.

2. Whether Petitioners' unilateral action in obtaining preclearance pursuant to Section 5 of the Voting Rights Act, 42 U.S.C. Sec. 1973c and which effectively mooted the controversy after the issuance of a temporary restraining order against Petitioners, was required by law.

LIST OF PARTIES

1. Hidalgo County Judge Ramiro M. Guerra; Petitioner
2. County Commissioner Norberto Salinas; Petitioner
3. County Commissioner Charles Curtis; Petitioner
4. County Commissioner J.R. Ponce; Petitioner
5. County Commissioner Ramiro Cavazos; Petitioner
6. Hidalgo County, Texas; Petitioner
7. Maria Carlota Garcia, individually and on behalf of all others similarly situated; Respondent
8. Juana de la Cruz, individually and on behalf of all others similarly situated; Respondent
9. Paulino Ramirez, individually and on behalf of all others similarly situated; Respondent
10. Jesus M. Hernandez, individually and on behalf of all others similarly situated; Respondent
11. Maria Hernandez, individually and on behalf of all others similarly situated; Respondent
12. Irene Sustayta, individually and on behalf of all others similarly situated; Respondent
13. Eloisa Leal, individually and on behalf of all others similarly situated; Respondent

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No. 84-1367

In The
Supreme Court of the United States
October Term, 1984

RAMIRO M. GUERRA, ET AL.,
Petitioners,

vs.

MARIA CARLOTA GARCIA, ET AL.,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

TO THE HONORABLE SUPREME COURT OF THE UNITED STATES:

The Respondents respectfully submit this their Brief in Opposition to the Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.

CITATION TO OPINIONS BELOW

Petitioners' citation of the opinions below in their Petition for Writ of Certiorari is correct. Petitioners have failed to note however, that on November 21, 1984, the appellate court filed a two sentence order which states as follows:

> It is ordered that appellants' motion to amend this Court's opinion and judgment is DENIED. The opinion and judgment contain no limitation upon the attorney's fees to which appellant rightfully is entitled.

JURISDICTION

Petitioners accurately state their allegations of jurisdiction in their Petition for Writ of Certiorari.

STATUTORY PROVISIONS INVOLVED

Petitioners accurately state the statutory provisions involved in their Petition for Writ of Certiorari.

STATEMENT OF THE CASE

The Petitioner's Statement of the Case as well as their brief in general contains incomplete interpretations of Texas election statutes and totally omits any mention of the outrageous fact situation which led to the filing of this lawsuit.

This lawsuit comes out of deep south Texas in the Rio Grande Valley which is the setting of many years of traditional rivalry between Anglo agribusiness and Mexican-American farmworkers. The early history of this area is peppered with land fraud, farmworker exploitation, brutality on the part of farmworker overseers or the Texas Rangers, segregated schools with schedules set up to allow Mexican-American children to pick crops, low wages, union busting, strikes, political exclusion of Mexican-Americans, rigged elections, and the "patron" system which is akin to feudalism. *Allee v. Medrano*, 347 F. Supp. 605, aff'd 416 U.S. 802, 807, 94 S.Ct. 2191 (1974) paints a more recent picture of the conditions and brutality against farmworkers in Hidalgo and neighboring Cameron County.

Progreso Independent School District (hereinafter PROGRESO) located in Hidalgo County, is a small rural school district which has approximately 900 students enrolled in its one elementary school. Approximately 95 to 98 per cent of the population and enrollment and about 80 per cent of the registered voters in the school district are Mexican-American. Approximately 226 students are migrant farmworker children who migrate north to harvest the crops with their parents in late May returning in mid September on a yearly basis. There are approximately 70 to 170 migrant registered voters who live within PROGRESO who are gone during the migrations.

The 3736 people who reside in PROGRESO have struggled over the years in attempting to provide a good education for their children. The voters of PROGRESO passed a 1.9 million dollar bond issue in an unsubmitted and unprecleared January, 1981 election in which *51 votes* decided the outcome. The money will be used to build the

district's first high school which will be staffed, designed, and operated with the problems of the migrant children in mind. The ranch owners and other landowners within PROGRESO are completely opposed to the issuance of the bonds because they will shoulder the greatest burden of paying for the high school through payment of the *ad valorem* property tax since they own most of the land. Additionally, the ranchers have generally refused to send their children to PROGRESO preferring instead to send their children to neighboring Weslaco Independent School District (hereinafter WESLACO) where their children would not be in the 4 per cent minority as they would be if they attended PROGRESO.

Efforts to defeat the bond election continued when the ranchers and their friends filed an action in the state courts seeking to declare the bond election illegal; they lost at the state trial level. They continued with the appellate process where, in all probability, they will lose as well. In a last-ditch effort to avoid the official issuance and sale of the bonds which has been held up until the state appellate process is over, the ranchers attempted to have Hidalgo County hold a consolidation election in hopes that PROGRESO and WESLACO voters would approve a consolidation of both school districts. In reality, this would be similar to an annexation since WESLACO is about 15 times bigger in student enrollment and population than PROGRESO. The effects and reasons that Plaintiffs-Respondents were opposed to the attempted consolidation were that: (a) PROGRESO would cease to exist as a political jurisdiction and all PROGRESO trustees would lose the positions to which they were elected; (b) 5 Anglo and 3 Mexican-American WESLACO trus-

tees would replace the 1 Anglo and 6 Mexican-American PROGRESO trustees; (c) voters would no longer elect trustees under an at-large plurality system as used in PROGRESO but would instead elect trustees pursuant to an at-large-by-place system as used in WESLACO which would significantly increase the probability that PROGRESO voters would lose their representation; (d) the demographics of the consolidated school district would lead to a retrogression of Mexican-American voting strength in PROGRESO; (e) the bonds passed pursuant to the bond election could not be issued; and (f) the high school in all probability would never be built. Such a consolidation would have had a highly discriminatory effect against Mexican-American migrant farmworkers in particular and Mexican-Americans in general.

Other than the one unprecleared bond election in January of 1981, and the election to incorporate PROGRESO in September of 1928, PROGRESO had never held elections at any other time of the year; their routine practice was to hold regular elections on the first Saturday of April.

The education statutes dealing with consolidation provide that if 20 registered voters of each school district wishing a consolidation file a petition with the County Judge, the County Judge must order a consolidation election so that the consolidation can be approved by a majority of the voters in each school district.

Pursuant to TEX. ED. CODE ANN. Sec.19.232 (1972), (Appendix H of Petition for Writ of Certiorari), the ranchers and their friends in each school district filed the first such petition on August 24, 1981. The County

Judge then ordered an election for January 16, 1982. Apparently realizing that they had passed up the opportunity to disenfranchise the migrant farmworker voters, the ranchers withdrew their first petition with a Petition to Withdraw. The consolidation election was called off. The ranchers then waited for all the migrant registered voters to leave on their yearly migration and on July 6, 1982 the ranchers filed another petition requesting a consolidation election for August 14, 1982. This is the second Saturday in August and is one of the four uniform election dates in the State of Texas provided by TEX. ELECT. CODE ANN. Art. 2.01b (Appendix G of Petitioners' Brief, hereinafter 2.01b). Out of approximately sixty to seventy signatures found on all the petitions, nine are found on all three petitions. These nine people include, among others, one school board member of each of the school districts and one previous mayor of a tiny village within PROGRESO. Though the petition has the requisite number of signatures, it is clear and almost common knowledge that these nine people masterminded the whole scheme. Respondents remain convinced that the petitions for consolidation were filed, withdrawn, and refiled with the intent of disenfranchising Mexican-American migrant farmworkers so as to give the supporters of the consolidation the winning edge at election time.

The County Judge attempted to act pursuant to TEX. ED. CODE ANN. Section 19.233 (Appendix H of Petitioners Brief) and Article 2.01b which have been precleared. Unfortunately, and counter to Petitioners' interpretation of Texas election law, the county Judge did not comply with subsection (e) of Art. 2.01b which requires that the election be called for the next election date which

"allows sufficient time to comply with other requirements of law" such as Section 5 of the Voting Rights Act. On the other hand, the ranchers and their friends acted pursuant to Section 19.232 which has never been submitted for preclearance since Section 19.232 has not been amended after November 1, 1972. Plaintiffs never alleged that the County Judge had acted with a discriminatory intent, however, every official in South Texas knows about the yearly migrations of the migrants and his disregard for the need for preclearance is at best a callous disregard for their voting rights. Other than now alleging that the county did not have to submit the new election date for preclearance, it is not clear why he did not submit the change as soon as he knew that he would be required to order the election. It is perfectly clear however, that the masterminds of the above described scheme had indeed acted precisely with a discriminatory intent in mind. They used state statutes that are neutral on their face in an attempt to discriminatorily disenfranchise Mexican-American migrant farmworkers by taking advantage of their absence during the yearly migrations.

Upon learning all these facts, the trial court correctly issued a temporary restraining order prohibiting the election in August of 1982. The Petitioners then reluctantly agreed to submit for and obtain preclearance before a three judge panel could be convened. After preclearance had been granted for the election at its normal time in April and after the consolidation was defeated, Respondents then filed their motion for attorneys' fees which was denied by the trial court. It is the denial of attorneys' fees by the trial court for which Respondents appealed

to the Fifth Circuit Court of Appeals and it is that court's reversal which brings the case before this court.

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SUMMARY OF ARGUMENT

The change from one precleared routine election date to another precleared unroutine election date is itself a change requiring preclearance. Since (1) the change is one which requires preclearance by law, (2) the Petitioners acted unilaterally to obtain preclearance and mooted the lawsuit after the temporary restraining order was issued, and (3) the temporary restraining order and unilateral action in obtaining preclearance was caused by the lawsuit. Respondents are the prevailing parties entitled to attorneys' fees.

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ARGUMENT FOR DENYING THE WRIT

A. The Decision Below Comports With Decisions Of The United States Supreme Court And With Well Established Voting Rights Law.

A recent Supreme Court decision concerning the applicability of the preclearance section of the Voting Rights Act quotes Department of Justice regulations which state:

> Any change affecting voting, even though it appears to be minor or indirect, even though it ostensibly expands voting rights, or even though it is designed to remove the elements that caused objection by the Attorney General to a prior submitted change, must meet the Section 5 preclearance requirement.

28 CFR Section 51.11 (1984) cited in *National Association for the Advancement of Colored People et al v. Hampton County Election Commission et al,* —U.S.—, 53 U.S.L.W. 4207, 4210 (1985).

Not only does recent as well as established caselaw clearly emphasize the need for preclearance, the preclearance documents in this case instructed these jurisdictions to obtain preclearance for these kinds of changes. Although it is true that blanket preclearance had been obtianed for all Texas political subdivisions for the four election dates, the Department of Justice in their December 16, 1975 letter to John F. Pettit, General Counsel, Office of the Secretary of State, State of Texas (Appendix J, Petitioners' Brief, pp. A42-A43) states:

> In reference to your request that your submission be considered a blanket submission for all political subdivisions in Texas, the submission is considered a blanket submission for those changes which are mandated by H.B. 275. Where H.B. 275 merely authorizes political subdivisions to make changes, i.e., Section 1c (where the governing body of political subdivisions whose elections fall in October or November may choose any of the four (4) dates) and Section 2, the changes would fall under Section 5 of the Voting Rights Act separately as the changes occur.

Furthermore, in a letter from the Department of Justice to the Honorable Mark White, Secretary of State, State of Texas, dated August 22, 1977, (Appendix O, Petitioners Brief, p. A70) the Department of Justice reminds the Secretary that:

> any changes in election date made pursuant to House Bill 443 (1977) are subject to the preclearance requirements of Section 5.

The assertion of the Petitioners that blanket approval had been obtained from the Attorney General for all four election dates, though true, completely misses the point of law involved and displays a misunderstanding and misinterpretation of the requirements of Section 5 of the Voting Rights Act.

In other words, the preclearance documents for H.B. 275 and H.B. 443, codified as TEX. ELECT. CODE ANN. Art. 2.01b, both indicate that even though the four election dates were precleared, the different local Texas jurisdictions still have to submit for preclearance changes from one precleared date to another precleared date "as the changes occur". It is simply ludicrous for Petitioners to continue to contend that preclearance was not required but it is the only argument they have left to avoid paying attorneys' fees.

B. The Decision Below Does Not Raise Any Significant Or Recurring Problems Regarding The Award Of Attorneys' Fees.

In ruling for Appellant-Respondents in this case, the Court of Appeals for the Fifth Circuit has repeated the well settled rule of law that a party may be considered to have prevailed when remedial action by the other party effectively moots the controversy. *Commissioners' Court of Medina County v. United States,* 683 F.2d 435 (D.C.Cir. 1982); *Iranian Students Association v. Sawyer,* 639 F.2d 1160 (5th Cir. 1981); *Doe v. Marshall,* 622 F.2d 118 (5th Cir. 1980). Most recently, *Hennigan v. Ouachita Parish School Board,* No. 84-4157 (5th Cir. 1985) cites well settled law and follows the line of cases that hold that in the absence of a determination on the merits, a plaintiff may

still recover attorneys fees when plaintiffs can show a causal connection between the filing of the suit and the Defendants' remedial action and that the defendant's conduct was required by law, i.e. was not a wholly gratuitous response to an action that in itself was frivolous or groundless. *Williams v. Leatherbury,* 672 F.2d 549, 551 (5th Cir. 1982). Nothing else is at issue on this appeal.

The facts of this case are clear and fit within those rules. It is only Petitioners' insistence on distorting clear law in an attempt to avoid paying attorneys' fees which has made this case unnecessarily complicated. Further arguments to the contrary to these well settled rules on the part of Petitioners are useless, are not made from any reasonable legal analysis, are a waste of taxpayers' money which is being used to defend these spurious arguments, and are interjected solely for the purpose of delaying the rightful payment of attorneys' fees to Respondents' attorneys.

C. The Decision Below Essentially Establishes That There Are No Special Circumstances.

As noted earlier in the Citations to Opinions Below, supra, p.2, the Appellate Court filed an order on November 24, 1984 indicating that its judgment in this case contains no limitation upon the attorneys' fees to which Appellant-Respondents are rightfully entitled.

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CONCLUSION

The Petition for Writ of Certiorari should be denied because the decision below does not conflict with decisions of the United States Supreme Court and indeed follows squarely in line with the most recent opinion of this court regarding the Voting Rights Act, correctly applies well established caselaw for the determination of entitlement of attorneys fees in cases such as this, and correctly remands the case for a determination of the appropriate attorney's fee award which is wholly justified.

Respectfully submitted,

LAURENCE E. NORTON, II
JOSE R. RODRIGUEZ
Staff Attorneys
DAVID G. HALL
Executive Director
Texas Rural Legal Aid, Inc.
259 South Texas
Weslaco, Texas 78596
(512) 968-9574

RAUL NORIEGA
Attorney of Record for
Respondents
Project Director
Voting Rights Litigation Project
Texas Rural Legal Aid, Inc.
201 N. St. Mary's St. Suite 630
San Antonio, Texas 78205
(512) 222-2478

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No. 84-1367

In the Supreme Court of the United States

OCTOBER TERM, 1984

RAMIRO M. GUERRA, ET AL.,
Petitioners.

VS.

MARIA CARLOTA GARCIA, ET AL.,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITIONERS' REPLY TO RESPONDENTS' BRIEF IN OPPOSITION

TRAVIS HIESTER
(Counsel of Record)
ATLAS & HALL
P. O. Drawer 3725
McAllen, Texas 78502
(512) 682-5501
Attorneys for Petitioners

E. L. MENDENHALL, INC., 926 Cherry Street, Kansas City, Mo. 64106, (816) 421-3030

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I.

Respondents' Factual Arguments

Respondents have filed their Brief in Opposition to Petitioners' Writ of Certiorari, which Brief contains historical material related to the Lower Rio Grande Valley of Texas. That material not only is completely unsupported by any evidence in the record in this case but also is not a true picture of this area and the people who reside in it. Respondents candidly admit that they never even alleged that Petitioners discriminated against them,

Brief . Opposition at p. 7; however, they present to this Court facts of this nature which have no relevance to the issues in this case.

II.

Respondents' Legal Arguments

Prior to the enactment of H.B. 275[1] by the Texas Legislature in 1975, political subdivisions in Texas could call special elections on almost any day of the year. H.B. 275 mandated that special elections be called and conducted only on one of the four dates specified therein, unless the Governor determined that an emergency existed which required the election to be conducted prior to one of the four dates in a special election to fill an office; in such case the election could be conducted on any earlier date. Section 1c of H.B. 275 set four specific dates for Texas political subdivisions to hold their regular or general elections to elect their officers.

Respondents admit that the United States Attorney General (Attorney General) on December 16, 1975, issued a blanket preclearance of this statute and the four dates contained therein for elections by Texas political subdivisions. (App. J to Petition for Writ of Certiorari at pp. A42-A43). Respondents attempt to qualify the blanket preclearance by referring to certain wording in the Attorney General's 1975 preclearance letter. This wording authorized, as a blanket approval for Texas political subdivisions, all changes which are mandated by H.B. 275, but required additional preclearance in situations where

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1. Reference is to House Bill No. 275, Chapter 715, Section 1, 1975, Tex. Gen. Laws, 2295-2296 (App. I to Petition for Writ of Certiorari at pp. A36-A37) codified as Tex. Elect. Code Ann. Art. 2.01b (Vernon Supp. 1985).

the political subdivision was authorized to make "changes." The Attorney General, as an example of such changes, lists those statutory subsections authorizing the choice to conduct regular elections with other political subdivisions and the choice to change the date of a political subdivision's *regular* elections. This specific preclearance language was construed by a three-judge district court in *Turner v. Fainter*, C.A. No. A83CA35 (W.D. Tex., Feb. 8, 1983) (App. K to Petition for Writ of Certiorari at pp. A44-A46), to permit political subdivisions to conduct special elections on one of the dates specified in Section 2.01b of the Texas Election Code (Vernon Supp. 1985) without further preclearance. The *Turner* court construed the mandatory language contained in sections 1a and 1b of H.B. 275, which sections specify the dates for special elections, as not included in qualifying language such as that contained in the December 16, 1975 preclearance letter.

H.B. 275 *mandates* that elections be held on one of the four dates set therein. In contrast, section 1c allows a political subdivision to elect to "change" the date otherwise set by the statute for the election to another date. The Attorney General's letter states specifically that it is a blanket preclearance for the changes mandated by the amendments, e.g., the change from the holding of special elections on any date to the holding of such elections on one of the four specific dates designated for special elections. The qualification in the Attorney General's letter relates to situations where the statute allows a choice by the political subdivision to take some action contrary to the actions mandated by the statute in absence of such choice, i.e., the "agreement" to hold joint elections pursuant to § 2a or the choice to change the stated date for regular elections pursuant to § 1c. There was no "change" when

the special election was called on one of the four dates specified in section 1a; rather, the election on one of those four dates was mandated by H.B. 275. The situation is directly analogous to that in *Turner* where it was determined that no "change" occurred when, pursuant to section 1b, a *special* election was called on any date prior to the next date specified in section 1a.

The August 22, 1977 preclearance letter (App. O to Petition for Writ of Certiorari at p. A70) addressed only changes in 1977 election dates made pursuant to the amendments to certain sections of the Texas Election Code. There was no change in the four dates for political subdivisions to conduct special elections made by the Texas Legislature in the 1977 amendments. This 1977 preclearance thus did not nullify the previous preclearance of the four dates specified by section 1a for special elections, because the language and dates specified in section 1a were not amended and remained unchanged.

The case cited by Respondents, *National Association for the Advancement of Colored People, et al. v. Hampton County Election Commission, et al.*, ... U.S. ....., 53 U.S.L.W. 4207 (1985) related to the change of the established date of a political subdivision's *regular* election rather than to the holding of a special election on a day previously precleared by the Attorney General.

After reviewing the language contained in the preclearance letters with respect to the pronouncements made by sections 1a, 1b and 1c of H.B. 275 and utilizing the construction made by *Turner*, it is abundantly clear that any qualifying language contained in the Attorney General's 1975 blanket preclearance does not cover special elections

of Texas political subdivisions held on one of the four dates specified in section 1a of H.B. 275.

Respectfully submitted,

TRAVIS HIESTER
(Counsel of Record)
P. O. Drawer 3725
McAllen, Texas 78502
(512) 682-5501
State Bar No. 09588000
Attorney for Petitioners

Of Counsel:

ATLAS & HALL
P. O. Drawer 3725
McAllen, Texas 78502
(512) 682-5501